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121	15	122	222.
174	22, 23	debtor, debtors	creditor, creditors.
393	foot-note (2)	6 Mac. & G.	1 Mac. & G.
728	head-note, last line	irrelevant	relevant.
751	10	possible	impossible.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

Distinguished. *Re* GEORGE, [1949] 1 Ch. 154

In re SCOTT. LANGTON *v.* SCOTT.

C. A. 1902 *Nov.* 12, 13.

[1900 S. 1048.]

Legacy—Satisfaction—Parent and Child—Double Portions—Gift by Parent to Child after Date of Will.

A father by his will made in 1891 gave the residue of his estate on trust for his children living at his death in specified proportions. And he declared that if any child should die in his lifetime, leaving a child or children who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry under that age, such child or children should take (and if more than one equally between them) the share which his or their parent would have taken in the testator's residuary estate if the parent had survived him. The testator also declared that the sum of 5000*l.* which he had already given to each of his daughters was not to be brought into account in ascertaining the share of a daughter in his residuary estate.

The testator carried on business in partnership with his eldest son John. The partnership deed provided that the son should not withdraw any part of his capital without his father's consent.

In 1892 the testator voluntarily gave his second son Alfred a sum of 5000*l.*

In 1894 the testator made a codicil slightly altering his will, and in all other respects confirming it.

In 1897, at the request of the son John, who had overdrawn his capital and was in pecuniary difficulties, the testator transferred 5000*l.* from his own capital account in the books of the firm to the capital account of the

C. A.

1902

SCOTT, *In re.* LANGTON *v.* SCOTT.

son, and also gave him 1500*l.* to enable him to pay off in part a mortgage debt.

In January, 1899, the son John died, leaving an only daughter, who afterwards married.

In May, 1899, the father died, leaving the son Alfred and six daughters surviving him.

Two of the daughters deposed to conversations with their father in which he spoke of the payment of the 5000*l.* to his son Alfred, and led them to believe that he never intended that that sum should be taken into account on his own death, but should be treated in the same manner as the two sums of 5000*l.* given to themselves were to be treated:—

Held, that the legal presumption that the gifts made by the testator to his two sons were intended as portions was under the circumstances rebutted, and that those sums ought not to be brought into account in the distribution of the testator's estate.

Decision of Kekewich J. affirmed.

But *held* (differing in this respect from Kekewich J.), that the daughter of the son John stood in the same position as her father, so that, if he would have had to account for the sums given to him by his father in his lifetime, she would have been equally liable to account for them.

The view taken by Jessel M.R. in *Taylor* v. *Taylor*, (1875) L. R. 20 Eq. 155—that a sum expended by a father in paying his son's debts is not necessarily an advance to the son by way of portion, but may be regarded as a temporary assistance—preferred to the view taken by Wood V.-C. in *Boyd* v. *Boyd*, (1867) L. R. 4 Eq. 305, and by Pearson J. in *In re Blockley*, (1885) 29 Ch. D. 250.

APPEAL against a decision of Kekewich J.

The question was whether some sums of money given by a testator to two of his children after the date of his will were to be treated as advances and were to be brought into account by those children in the distribution of the testator's estate.

The testator, John Scott, was a man of considerable wealth. He carried on the business of a manufacturer and warehouseman in partnership with his eldest son, John Scott, junior, and two other persons. The son originally brought no capital into the business, but his capital consisted only of accumulations made from time to time of parts of his share of the profits, and the partnership deed provided that the son "shall not at any time during the continuance of the partnership withdraw any part or parts of his capital without the consent of" the father, but that the father "may withdraw any portion of his capital or other moneys as he may think fit, provided that he does not reduce the amount of his capital below the sum of 50,000*l.*"

The testator died on May 12, 1899. He left surviving him a son Alfred and six daughters, four of whom were married and two unmarried. His eldest son John had died in January, 1899.

By the will of the father, dated June 5, 1891, after making some specific and pecuniary bequests and making devises of parts of his real estate, he devised and bequeathed all his real and personal estate not thereby otherwise disposed of unto his trustees, upon trust for the payment of his funeral and testamentary expenses, debts and legacies, and to stand possessed of the residue "in trust for all my children who may be living at my decease in such proportions that the share of each of my sons shall be double the amount of the share of each of my daughters, and that the shares of my daughters shall be equal. And I further declare that the sum of 5000*l.* given by me to each of my married daughters on their respective marriages, and the like sum of 5000*l.* recently given by me to each of my unmarried daughters, is not in any way to be brought into account in ascertaining the share of my same daughter of and in the residuary trust funds, but is to be retained and enjoyed by her in addition to such share." And the testator declared that "if any child of mine shall die in my lifetime, leaving a child or children who shall survive me, and being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry under that age, then and in every such case the last-mentioned child or children shall take (and if more than one equally between them) the share which his or their parent would have taken of and in my residuary trust estate if such parent had survived me."

On August 3, 1892, the testator gave to his son Alfred a sum of 5000*l.* This sum was given voluntarily without any solicitation by the son. On that day the testator wrote to the son as follows: "My dear Alfred,—I have this day placed to your order 5000*l.* with our firm, on which you will be paid 5 per cent. per annum so long as it is in the hands of the firm. I hope you will find it useful and something to lean on and call your own." This was the first intimation to the son of his father's intention.

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On June 7, 1894, the testator made a codicil to his will by which he altered a provision which he had thereby made with regard to his capital in the partnership business, and in all other respects he confirmed his will.

For some time preceding the year 1897 the profits of the business had materially diminished, and the expenditure of the son John had exceeded his income, the result being that the capital which he had accumulated in the business was considerably reduced. This had been done without the father's consent.

On August 31, 1897, the son John had an interview with his father. The circumstances attending the interview and the result of it were stated as follows in a letter which the son wrote on that day to his sister Fanny Scott, who lived with her father and kept house for him, his wife having died some years previously: "Dear Fanny,—Finding father clear this P.M., I took the opportunity of placing the anxiety of my position before him, noting, not that our expenditure had increased, but that the profits from the business for the last three or four years had been so small that I had been compelled to encroach on my capital to a serious extent, and that, unless he was willing to help me, I should feel it compulsory to save what little is left, to give up here" (that is, his house at Chislehurst), "and part with my position in society. I pointed out that I had never before asked him directly for myself, and that, though his eldest son, he had never given me any money or assistance of any sort. It was a very hard and painful struggle for him to part at all, but he has given me 5000*l.*, the amount you all have had, to be added to my capital; 1500*l.* to reduce the mortgage on this place. I need scarcely say it is most welcome and a huge relief."

On August 31, 1897, a sum of 5000*l.* was accordingly transferred from the testator's account in the books of the firm to the account of the son John. And on September 21, 1897, a further sum of 1500*l.* was transferred from the account of the testator to that of the son John.

The son John left a widow and one daughter surviving him. In May, 1900, the daughter married Humphrey L. Bland.

A summons was taken out by the executors and trustees of the testator for the determination of the question whether the sum of 5000*l.* advanced by the testator to his son Alfred, and the sums of 5000*l.* and 1500*l.* advanced by the testator to his son John ought respectively to be brought into account by way of hotchpot in the division of the testator's residuary trust funds.

In an affidavit made by the unmarried daughters, Fanny Scott and Emily Scott, they said: "Our father on more than one occasion in speaking to us referred to the 5000*l.* which he gave to our brother Alfred, and, to the best of our recollection, our father spoke to us on the subject of the said gift both before and after he made it. The exact words used by our father we are unable to state, but he referred to it in this way—that he had given each of his girls 5000*l.*, and 5000*l.* to his dear Alfred. As a fact our father had given to each of us the sum of 5000*l.* before the month of August, 1892, and he always in his conversations with us alluded to the sum given to Alfred as a gift to him; and we gathered from his conversations with us that he never in any way meant or intended that the 5000*l.* so given to our brother Alfred should be in any way taken into account on his death, but should be treated in the same manner in which the two sums of 5000*l.* given to us were to be treated."

Kekewich J. held that neither of the sums in question was to be brought into account. Upon the evidence he was of opinion that the gift to the son Alfred was more in the nature of a casual gift than of a provision for life. His Lordship thought the case more difficult as regarded the gifts to the son John, but on the whole he thought that they ought not to be brought into account. And, moreover, the learned judge thought that, even if the son John himself would have been liable to account, he never took a share under the will, and his daughter, who took the share which he would have taken if he had survived his father, was not liable to account for the advances which her father had received. His Lordship thought that *Rose* v. *Rogers* (1) justified him in so holding.

The testator's daughters appealed.

(1) (1870) 39 L. J. (Ch.) 791.

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Younger, K.C., and *Rowland Whitehead*, for the appellants. The rule in these cases is, that at the time when a father makes his will he is presumed to have made a scheme for the distribution of his property amongst his children; and, if he afterwards makes a gift to a child by way of portion in his lifetime, that gift is assumed to be in anticipation of the scheme so made, and to be in part performance of it. The question is whether there is enough in the circumstances of this case to rebut the presumption that the gifts in the lifetime of the testator are to be taken as made on account of, and in anticipation of, the scheme: *In re Lacon.* (1) It is submitted that there is not enough to rebut the presumption.

[VAUGHAN WILLIAMS L.J. Are not these payments to John something in the nature of temporary assistance, as defined by Jessel M.R. in *Taylor* v. *Taylor* (2)?]

The payments in this case are so large, so much larger than the casual payments referred to in *Taylor* v. *Taylor* (2), that they cannot be considered as belonging to the class of payments there referred to. Besides, that case is inconsistent with *Boyd* v. *Boyd* (3), and has been dissented from on this point in *In re Blockley* (4) by Pearson J. [*Leighton* v. *Leighton* (5) was also referred to.] If *Boyd* v. *Boyd* (3) is the better law, then any sum of considerable amount, like these, paid out of the common fund of the family, ought to be considered as an advance which must be accounted for.

Then it was decided in the Court below that, even if John has to account, his daughter as representing him is not under the same liability; and for this *Rose* v. *Rogers* (6) was relied on.

[They were stopped on this point.]

Warrington, K.C., and *Christopher James*, for Mrs. Bland. The question in each case is whether the sums given to the child are to be considered as portions, or as mere gifts: *Pym* v. *Lockyer.* (7) The presumption against double portions may be rebutted. No doubt in *Boyd* v. *Boyd* (8) Wood V.-C. said:

(1) [1891] 2 Ch. 482.
(2) L. R. 20 Eq. 155, 159.
(3) L. R. 4 Eq. 305.
(4) 29 Ch. D. 250.
(5) (1874) L. R. 18 Eq. 458.
(6) 39 L. J. (Ch.) 791.
(7) (1840) 5 My. & Cr. 29, 35; 48 R. R. 219.
(8) L. R. 4 Eq. 308.

"wherever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance. The payment of the money is the important thing—the Court does not look to the application." And in that case it was held that sums of money given by a father to his son to enable him to pay debts of honour must be treated as advances. But in *Taylor* v. *Taylor* (1) Jessel M.R. said: "I have always understood that an advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him. . . . . Again, if in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him; but if a small sum is so given you may require evidence to shew the purpose. . . . . Not every payment is a provision for the child; and I think that Wood V.-C. referred to that when he said, in *Boyd* v. *Boyd* (2), that the sum must be paid for a particular purpose; by which I understand him to mean a special purpose with a view to the establishment of the child in life." And in that case it was held that the payment by a father of the debts of his son, an officer in the army, was not an advancement.

In *In re Blockley* (3) Pearson J. held that a sum of 1200*l.* given by a father to his son to enable him to pay a debt was an advancement. And the learned judge said that he could not agree in the view of Jessel M.R. He thought (4) "that a sum of money given by a father to his son to pay his debts is, or may be, an advancement, as much as a sum of money given him for any other purpose." If *Taylor* v. *Taylor* (1) is inconsistent with the other cases, it is submitted that it should be preferred. An advancement means something in the nature of an advancement of the child in the world—a payment to the child in anticipation of the time at which it would naturally come to him. The true legal meaning is that which was stated

(1) L. R. 20 Eq. 155, 157.
(2) L. R. 4 Eq. 305.
(3) 29 Ch. D. 250.
(4) Ibid. 252.

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by Jessel M.R. in *Taylor* v. *Taylor*. (1) The principle is stated rather differently by James L.J. in *Fowkes* v. *Pascoe*. (2) Even if the son John himself would have been bound to account for the gifts made to him, this does not apply to his daughter, who does not take his share under the will, but is substituted for him: *Rose* v. *Rogers*. (3)

With regard to the gift to the son Alfred, the fact that the codicil confirming the will was made after the gift is a matter not to be left out of consideration: *Ravenscroft* v. *Jones*. (4)

Renshaw, K.C., and *E. S. Ford*, for the son Alfred. It is clearly settled that advances made to a child by a father before the date of his will have not to be brought into account by the child. The codicil brought the will down to the date of the codicil. The gift to Alfred was purely gratuitous; it was not solicited by him. This is enough to rebut the presumption that it was an advancement.

Rowland Whitehead, in reply. There are, as Bowen L.J. said in *In re Lacon* (5), two presumptions: (1.) that a gift by a father to a child is intended to be a portion, and (2.) that it is intended as an advancement of a gift already made to the child by will, though both presumptions may be rebutted. It is submitted that in the present case they are not rebutted. The Court leans against double portions, and the onus is on the person who has received the gift to shew affirmatively that it was intended to be a merely casual gift. Even though a gift is not made on marriage or on any other special occasion, with reference to the donee it may be a satisfaction of a legacy: *Leighton* v. *Leighton*. (6)

But, even if the onus is on the daughters, the facts are in favour of the view that the testator, when making the gifts to the sons, intended to make a permanent provision for them. The object of a portion is to secure that the child shall occupy a certain position in life. That was really the object which the son John put before his father, for there is in principle no distinction between acquiring a position and retaining one

(1) L. R. 20 Eq. 155.
(2) (1875) L. R. 10 Ch. 343, 350.
(3) 39 L. J. (Ch.) 791.
(4) (1864) 4 D. J. & S. 224, 228.
(5) [1891] 2 Ch. 482, 498.
(6) L. R. 18 Eq. 458.

already acquired. The view taken by the daughters, however, is that the sums received by John were intended as advancements in respect of his share under his father's will, but that the 5000*l.* given to Alfred was intended as a gift which he was not to bring into account.

VAUGHAN WILLIAMS L.J. We think that the judgment of the learned judge must be affirmed as regards both the sons. I may as well say, although I do not think it is material for the decision of this appeal, that we cannot agree with the conclusion of the learned judge as to the position of John's daughter. We think it is plain that she could take only that which her father would have taken, and it is impossible to arrive at the conclusion that in the case of the father the result would have been different from that in the case of the daughter, who was to take an interest in the event of his death before the testator.

The real question is whether the two sons, or either of them, by the receipt from their father of the sums of money which they respectively received, brought themselves within the rule against double portions, so that now, when the residue of the father's estate comes to be distributed under the provisions of his will, which was made before the payments to either of the sons, the sums so received by them must be brought into account or into hotchpot by them. In my opinion the case does not come within the rule against double portions.

I will take the case of the son John first, and I will endeavour to deal with it exactly upon the basis which was pointed out by the Court of Appeal in *In re Lacon* (1) as the right one. I will take the statement of the law from the judgment of Bowen L.J., not because it does not appear in the other judgments, but because I think it appears more conveniently in the judgment of Bowen L.J. The passage was read by Mr. Whitehead in the course of his very cogent argument. The learned Lord Justice said (2): "In order to establish a case for the application of this rule as to double portions, there must be two matters, I think, made out, and it will be seen

(1) [1891] 2 Ch. 482. (2) [1891] 2 Ch. 497.

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upon reflection that there are two presumptions really which are to be considered, and not one. In the first place, both of the suggested gifts or donations must be gifts in the nature of a portion." So every gift will not do to bring you within this rule against double portions; you must have two portions; the gift which follows the making of the will must be a gift in the nature of a portion. "The first presumption here comes under discussion: it is said that, whatever gifts are made by the father, which it may be supposed will have to be distributed among the children, or which are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule." That is, not that every gift is to be taken to be a portion within the meaning of the rule, but only gifts which bear those characteristics are to be so taken. "We have, therefore, to ask ourselves, in the first place, were these two shares which were received during the lifetime of the father received under such circumstances as to justify their being treated and considered as a portion?"

Now, with regard to the son John the gift, or whatever it may be called, of this sum of 5000*l.*—a large sum of money—bears so much the characteristics of a portion that, in the absence of anything to rebut the conclusion, we ought, I think, to assume that the first of the presumptions mentioned by Bowen L.J. applies. Then the learned judge continued: "But, supposing both gifts are gifts in the nature of portions, then comes a further question, for the solution of which a further presumption is invoked. That question is, whether it was intended that the former gift or portion should take the place of an advancement of the gift which is given by the will, and there the second presumption which is invoked has to be dealt with—a presumption to the effect that the former gift, the gift inter vivos, was intended as an advancement pro tanto of the gift under the bequest—a presumption, it is said, which ought to be made in favour of equality amongst children, it being the view of the law that equality is what the father, in dealing with his children, would, in most cases, presumably intend."

Now it seems to me that, according to that judgment of

Bowen L.J., we are entitled, and it is our duty, to consider all the circumstances of the present case and see whether this presumption is or is not rebutted. And, in dealing with that, I will refer to a passage in the judgment of James L.J. in *Fowkes* v. *Pascoe*. (1) He said: "The principle is that the will shews the distribution which the father thinks just and expedient for his children, and if, after having made such a scheme for distribution, he advances one of his children on marriage, or going out to establish himself in the world, or the like, it is to be presumed, as a presumptio juris et de jure, that the advancement is an anticipation of the testamentary provision, just as under the Statute of Distributions an advancement is to be brought into hotchpot." I do not think the Lord Justice meant to say that the presumption is irrebuttable. So to read his judgment would, I think, be inconsistent with all the cases. I need not go through them seriatim, but in the course of the argument there have been cited many cases in which the circumstances were such as to raise a primâ facie presumption which was afterwards held to be rebutted. My brother Cozens-Hardy L.J. reminds me that *In re Lacon* (2) itself is an instance in point. That being so, we have to consider whether this particular 5000*l.* given to John was intended by the father as something on account of the son's share of the family fund which the father was distributing by his will. In my judgment, it was not. I do not base my conclusion upon any one fact alone; we must take the whole of the circumstances into consideration. Before we can come to the conclusion that the 5000*l.* was intended as such an advance we must ask whether, taking all the facts into consideration, the 5000*l.* was intended for the establishment of the son in life, or for any of those purposes which are detailed by Jessel M.R. in *Taylor* v. *Taylor*. (3) And, when we ask that question, we find that in fact the sum of 5000*l.* had been given by the father to each of his other children. He had given that sum to each of his daughters. By his will he expressly provided that in the case of the daughters those sums of 5000*l.*

(1) L. R. 10 Ch. 343, 350. (2) [1891] 2 Ch. 482.
(3) L. R. 20 Eq. 155.

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were not to be brought into account by them. His son John was in partnership with him; the son had overdrawn his capital account, and this was a matter of which the father, and the father only, could complain. When those circumstances were brought by the son to the notice of the father, he dealt with the son in the same way in which he had dealt with his daughters, namely, by making him a gift of 5000*l.* And, in my judgment, the fact that the sums were identical is itself a matter which must not be left out of consideration when we have to determine whether this was a gift or an advancement by way of portion. Moreover, we see that the father, who, as I have already said, was the only person who could complain of what the son had done, was in effect releasing the debt of the son to himself. He was in fact, in my opinion, extricating the son from the difficulties in which he then found himself, and for this purpose it seems to me that it makes no difference whether the debt was due to the father or to some one else. The ultimate object of the father was to relieve the son from his embarrassments. And in *Taylor* v. *Taylor* (1) a father, who had paid a sum of 650*l.* to extricate his son from debts of honour in India, was treated by Jessel M.R. as having thus made a gift to his son, and not an advancement by way of portion.

Taking all these circumstances together, I think that, even assuming that the amount of the payment was such as to raise a primâ facie presumption that the 5000*l.* was an advancement, there is sufficient here to displace that presumption, and to leave the 5000*l.* a gift.

As regards the further payment of 1500*l.* to John, it seems to me that it clearly falls within the rules laid down by Jessel M.R. in *Taylor* v. *Taylor*. (1) It was plainly a payment to relieve the son pro tanto from a debt which might have been enforced against him by the mortgagees, if the father had not come forward with his assistance.

With regard to the son Alfred, again, the amount given to him was the same as that which had been given to the daughters, and primâ facie it would seem to me that that pay-

(1) L. R. 20 Eq. 155.

ment should be treated upon the same basis—that is, as a sum which was not to be brought into hotchpot. But in the case of Alfred there is this additional fact—that after the gift the father made a codicil by which, after making a slight alteration, he confirmed his will in all other respects.

In these circumstances I think the conclusion of the learned judge as regards Alfred was also right, and consequently that the appeal fails.

STIRLING L.J. I am of the same opinion. The question for our decision arises with regard to some sums of money which were given by a testator to his two sons after he had made his will. By the will the testator had directed his residuary estate to be divided between his sons and daughters in specified proportions, and in the will he stated that he had already given a sum of 5000*l.* to each of his daughters, and, although it was not necessary that he should do so, he expressly excluded those sums from being brought into account in the division of his estate, saying that the daughters were not to be under any obligation to bring those sums into account in ascertaining their shares of his estate. At that date (except that he had taken one of his sons into partnership) he had not made any such gift or advance to either of his sons. But after the date of the will he, in the first place, gave his son Alfred, who was a clergyman, in 1892, a sum of 5000*l.* upon the terms expressed in the letter of August 3, 1892. [His Lordship read the letter, and continued :—] I shall assume that this sum of 5000*l.*, being a large one, would, in the case of an ordinary estate, be primâ facie taken to be an advance within the rule against double portions ; but in this particular case I think it is a circumstance which must be taken into consideration and must have considerable weight, that the testator had already given the large sum of 5000*l.* to each of his daughters, and, though it was not necessary that he should do so, he had expressly stated in his will that those sums were not to be deemed to be advancements. So that we are here dealing with a testator who had already given six sums of 5000*l.* to his daughters, and yet he did not desire that those sums should be

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brought into account in the ultimate distribution of his estate. But, as regards the son Alfred, the matter does not rest there. Two of the daughters have made an affidavit in which they state the effect of conversations which took place between themselves and their father after he had made the gift to Alfred. [His Lordship read the affidavit, and continued:—]

So we have this general result, that in his conversations with the two daughters, in speaking of what he had given to his six daughters and of what he had given to this particular son, he dealt with them as being on the same footing. The reasonable inference from that would, I think, be that his intention in giving this sum of 5000*l.* was to put this son, who was not in partnership with him, on the same footing as the daughters.

Lastly, there is this to be observed—that after he had made the gift to Alfred, and before he made the gift to his other son (with which I shall deal presently), he made a codicil to his will. In that codicil he does not expressly refer to the gift which he had made to Alfred, but, after making certain alterations in his will, which it is unnecessary to mention, he does in all other respects expressly confirm his will.

Now, in *Ravenscroft* v. *Jones* (1) it was laid down by Knight-Bruce L.J. that "the existence of such a codicil, even though not decisive of the question, is a fact which cannot be left out of consideration"; and, looking at all the circumstances of the present case, I think that the learned judge has come to a right conclusion as regards the sum of 5000*l.* which was thus given to Alfred.

The case of the son John is, perhaps, one of more difficulty than that of Alfred. Two of the elements upon which I have based my judgment in Alfred's case do not occur here. In the first place, there is no evidence of any such conversation with reference to the gift to John as we have in reference to the gift to Alfred; and, in the second place, the gift to John was made after the codicil, and the testator did not make any subsequent codicil. Nevertheless, looking at all the circumstances, I come to a similar conclusion in John's case. The gift was

(1) 4 D. J. & S. 224, 228.

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made in the year 1897. The son John was in partnership with his father and two other persons; but by the terms of the partnership deed John was bound as between himself and his father to keep a certain amount of capital in the business, though the father had left himself free to deal with his own capital as he thought fit. The other partners had no power to interfere with the arrangements between the father and the son. It appeared in 1897 that the business had not been so prosperous as it had formerly been, and the result was that the son had drawn out of the business in excess of that which he was entitled to draw, and was under a liability to his father, if the father chose to insist on it, to repay the excess of his drawings having regard to the amount of the profits which had been earned for several years previously. In fact the son's capital had been reduced, but his exact legal position was that he was under an obligation to his father to repay his excess of drawings. In these circumstances he approached his father on August 31, 1897, and in a letter written on that day to his sister he gave an account of what took place between his father and himself. [His Lordship stated the effect of the letter, and continued :—]

No doubt the gifts which had been made by the father to the daughters and to Alfred were perfectly well known to John—there seems to have been no secret in the family about them—and the application by John to his father was partly based on the ground that he had had nothing from his father as his brothers and sisters had had. The result was this—the father transferred 5000*l.* from his own capital account to the capital account of the son, and he gave him 1500*l.* to enable him to pay off in part a mortgage on the son's house. The question is whether these gifts ought or ought not to be treated as advances within the rule against double portions. In my opinion they ought not. I think the distinction which was taken by Jessel M.R. in *Taylor* v. *Taylor* (1) is sound. In that case a father had (inter alia) paid the debts of his son, who was an officer of the army in India, and Jessel M.R. (2) dealt thus with that payment : "The sums paid for debts in India

(1) L. R. 20 Eq. 155. (2) L. R. 20 Eq. 159.

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appeared to be in the nature of temporary assistance; thus, if a child were in business and required further capital, a sum given for that purpose would be an advancement; but a sum given merely to assist him temporarily would not. The sum given to pay the debts in India therefore need not be accounted for." It was contended that in form this gift of 5000*l.* to John falls within what Jessel M.R. laid down with reference to a son engaged in business and requiring additional capital. It is true that here the transaction as between the father and the son took the form of a transfer of 5000*l.* from the father's capital account to that of the son. But no further capital was brought into the business, and it seems to me that really further capital was not required by the son for the business, but rather a debt from the son to the father in the business was wiped out by means of this transfer of the 5000*l.*

As regards the 1500*l.*, which was advanced to pay in part the mortgage debt, it seems to me that this also was a temporary assistance. The whole thing was done by the father with a view of enabling the son to keep up the position which he had acquired by means of the partnership, without bringing in any capital at first, and to tide over the difficulties which had arisen by reason of the small amount of profits earned during the three or four years preceding this transaction.

In my opinion, therefore, the appeal ought to be dismissed.

COZENS-HARDY L.J. I agree. I wish to thank Mr. Whitehead for his very clear and able argument, and to address one or two observations to it. I agree with him that, if nothing more had been known than that such a large sum as 5000*l.* had been given to a child by his father in the interval between the date of his will and that of his death, there would be a presumption, which in that case would not be rebutted, that it was to be taken by the child in partial satisfaction of the provision made for him by the will. But I think it is equally clear, to use the language of Knight Bruce L.J. in *Ravenscroft* v. *Jones* (1), that "the whole of the circumstances in evidence, the time, circumstances and manner of the gift," must be

(1) 4 D. J. & S. 228.

looked at; and, if we come here to the conclusion, as that learned Lord Justice did in that case, that the testator when making the gift had not the dispositions made by his will in any way in his mind, it is, I think, clear that then the presumption does not bind us, but must be taken to be rebutted. I will not go through the facts of the case again. We are dealing here with a very wealthy man, whose estate was worth 200,000*l.* or 250,000*l.* He had before he made his will given 5000*l.* to each of his daughters; after his will he gave to his son Alfred a sum identical in amount. The terms of the gift we know from the letter which he wrote, and we have also the evidence of two of the daughters, which, I think, would alone be sufficient to negative the presumption. Then there is the codicil, to which also I attach considerable weight, because it is a confirmation of the will after the gift of the 5000*l.*

As regards the son John there is, no doubt, more difficulty, but, for the reasons which have been stated by my Lord and my brother Stirling, I agree that in this case also the presumption is rebutted.

Our decision, no doubt, involves this—that, in so far as there is a difference between the view expressed by Jessel M.R. in *Taylor* v. *Taylor* (1) on the one hand, and that expressed by Wood V.-C. in *Boyd* v. *Boyd* (2) and Pearson J. in *In re Blockley* (3) on the other hand, we adopt the view of Jessel M.R. in preference to that of Wood V.-C. and Pearson J. And in so doing I think we are really following, not perhaps the decision, but the indication of the opinion of the Court of Appeal in *In re Lacon.* (4)

For these reasons I think the appeal ought to be dismissed.

Solicitors: *Phelps, Sidgwick & Biddle; P. W. Chandler.*

(1) L. R. 20 Eq. 155.
(2) L. R. 4 Eq. 305, 309.
(3) 29 Ch. D. 250, 252.
(4) [1891] 2 Ch. 482.

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Dec. 2.

WOOLFE *v.* AUTOMATIC PICTURE GALLERY, LIMITED.

[1901 W. 4671.]

Patent—Leave to Amend Specification—Jurisdiction of Comptroller—Petition for Revocation presented after Application for Leave to Amend but before Decision thereon—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 18, *sub-s.* 10; *s.* 19—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 5.

An application for leave to amend the specification of a patent having been made to the comptroller under s. 18 of the Patents, &c., Act, 1883:—

Held, that the subsequent presentation of a petition for revocation of the patent, before the comptroller had given his decision, did not, by virtue of sub-s. 10 of s. 18, operate to suspend his jurisdiction, but that he could, notwithstanding the pendency of the petition, grant leave to amend.

Decision of Kekewich J. affirmed.

APPEAL from a decision of Kekewich J. (1)

The plaintiff was the grantee of a patent, No. 12,160 of 1898.

On April 1, 1901, he applied at the Patent Office for leave to amend the specification.

On July 3, 1901, the defendants presented a petition for the revocation of the patent. On August 9, 1901, the comptroller heard the plaintiff in support of his application for leave to amend and the defendants in opposition, and on August 14 the comptroller allowed the specification to be amended by striking out four of seven claims which had been made. No leave of the Court had been obtained.

On September 26, 1901, the plaintiff commenced this action for infringement of the patent as amended. The defendants objected that, so long as the petition for revocation was pending, the comptroller had, by virtue of sub-s. 10 of s. 18 of the Patents Act, 1883, as amended by s. 5 of the Patents Act, 1888, no jurisdiction to allow the amendment, except with the leave of the Court under s. 19.

(1) W. N. (1902) 137.

Kekewich J. held that, the application for leave to amend having been made before the presentation of the petition for revocation, sub-s. 10 of s. 18 did not prevent the continuance of the application after the petition had been presented, and consequently that the comptroller has jurisdiction to allow the amendment.

The defendants appealed.

Moulton, K.C., and *J. W. Gordon*, for the defendants. The defendants rely on s. 18, sub-s. 10, of the Patents, &c., Act, 1883, as amended by s. 5 of the Patents, &c., Act, 1888 (1), as conclusive that, while an action for infringement or proceeding for revocation is pending, no application for amendment of a specification can be proceeded with, except by leave of the Court under s. 19, which is in the nature of a proviso to s. 18: *In re Deeley's Patent* (2); *Andrew & Co., Limited* v. *Crossley Brothers, Limited.* (3)

The main question is whether, when the application to amend has been made before the commencement of an action for infringement or a proceeding for revocation of the patent, the

(1) By the Patents, &c., Act, 1883, s. 18, sub-s. 1, "An applicant or a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of such amendment and his reasons for the same."

By sub-ss. 2 to 8 inclusive, provisions are made for the advertisement of the application, notice of opposition, the hearing of the applicant and the opposer, and the determination whether and subject to what conditions (if any) the amendment ought to be allowed.

Sub-s. 9: "Leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall in all Courts and for all purposes be deemed to form part of the specification."

By sub-s. 10 (as amended by s. 5 of the Act of 1888), "The foregoing provisions of this section do not apply when, and so long as any action for infringement or proceeding for revocation of a patent is pending."

By s. 19 of the Act of 1883, "In an action for infringement of a patent, and in a proceeding for revocation of a patent, the Court or a judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed."

(2) (1894) 11 Rep. Pat. Cas. 72, 76.

(3) (1892) 9 Rep. Pat. Cas. 165.

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proceedings for amendment are suspended during the pendency of the other proceedings. And there is a subsidiary question, namely, whether leave to amend having been given is made conclusive of the right to amend by sub-s. 9.

[VAUGHAN WILLIAMS L.J. If there was no jurisdiction to allow the amendment it must be void.]

If the proceedings for amendment are, as it is submitted, suspended, they would not, as the learned judge thought, be rendered abortive, but the Court would have the jurisdiction instead of the comptroller, and would exercise its discretion. Sub-s. 10 in express terms applies to all the provisions of s. 18. There can be no reason why a patentee should be allowed, without being put on terms, to go on with an application to amend while an action for infringement or a petition for revocation is pending, when he could not under such circumstances commence an application for amendment.

In *Singer* v. *Stassen & Son* (1) the question was very different from that which arises now: the question was whether s. 19 was retrospective—whether it applied to an action commenced before the Act came into operation, and the dictum of Fry L.J. on which the plaintiff relies has no bearing on the present question. In *In re Deeley's Patent* (2) no doubt Chitty J. assumed that when there was a petition for revocation it was necessary that the patentee should obtain the leave of the Court to continue the proceedings under an application for amendment which he had made before the petition was presented. But the point was not argued.

T. Terrell, K.C., and *A. J. Walter*, for the plaintiff. Sect. 18 contemplates that an application for leave to amend may, when no litigation is pending, be made without the leave of the Court; but by s. 19 when litigation is pending the patentee can apply for amendment only with the leave of the Court, and then only to amend by way of disclaimer. If the defendants are right, after an application has been made for leave to amend by way of correction or explanation, the application may be stopped by the presentation of a petition for revocation, and then the patentee can only under s. 19 obtain from the Court

(1) (1884) 1 Rep. Pat. Cas. 121, 126. (2) 11 Rep. Pat. Cas. 72.

liberty to apply for leave to amend by way of disclaimer. Sect. 19 is limited to amendment by way of disclaimer, and, if the defendants are right, a patentee, who has already exercised the right given to him by sub-s. 1 of s. 18 to apply for leave to amend by way of correction or explanation, will be deprived of that right by the presentation of a hostile petition for revocation.

[STIRLING L.J. Sub-s. 10 only suspends the operation of the previous provisions of s. 18. But if the patent were revoked on the hearing of the petition the patentee might lose the whole benefit of s. 18.]

Sub-s. 10 cannot mean that none of the previous provisions of s. 18 are to apply while any litigation is pending. If so, sub-s. 9 would be nugatory. Sect. 19 enables the Court to allow the patentee while litigation is pending to apply at the Patent Office for leave to amend by disclaimer. The only provisions in the Act regulating such an application to the Patent Office are contained in s. 18, and, if those provisions do not apply while litigation is pending, an order of the Court giving liberty to apply for leave to amend by disclaimer would be fruitless. The order could not be carried out. The true construction of sub-s. 10 is that it only prevents an application under sub-s. 1 for leave to amend being made after litigation has been commenced, but an application made before litigation is not stopped by the subsequent commencement of litigation. Sect. 19 is a substitute for sub-s. 1 of s. 18 with regard to applications for leave to amend made after the commencement of litigation. The word "pending" in sub-s. 10 must mean "pending" at the time when the application for leave to amend is made. Sect. 19 applies only to cases in which no application for leave to amend has been made before the commencement of litigation.

J. W. Gordon, in reply. Sub-s. 10 of s. 18 merely suspends the proceedings for amendment pending litigation; it does not put an end to them. The Court could make an order for revocation nisi, as in *Deeley* v. *Perkes*. (1)

Cur. adv. vult.

(1) [1896] A. C. 496, 499.

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Dec. 2. VAUGHAN WILLIAMS L.J. read the following judgment:—The question in this case is, What is the effect, after there has been a request in writing pursuant to s. 18 of the Patents, Designs, and Trade Marks Act, 1883, seeking leave to amend the specification of a patent by way of disclaimer, correction, or explanation, of the commencement of an action for infringement, or a proceeding for revocation of the patent? It is argued that the effect is that the jurisdiction to amend under s. 18 is suspended, so long as that action or proceeding is pending, whether or not there has been a prior application made for leave to amend. The statute is very difficult to construe, but on the whole I have come to the conclusion that the commencement of legal proceedings has not this effect upon the jurisdiction to amend. I think the scheme of the Act, so far as amendment is concerned, is that s. 18 deals with amendments in cases where the leave to amend is sought before any legal proceedings in relation to the patent have been commenced, while s. 19 deals with the power to give leave to disclaim during action part of an invention as claimed. Sect. 18, sub-s. 1, it will be observed, gives the power to an applicant or patentee to seek leave to amend. There are ten sub-sections in the section; these, except the last, deal with the manner of proceeding after such an application has been lodged, making the comptroller the authority to determine, in the first instance, whether leave to amend shall be given, and providing for advertisement of the application and for the hearing of those who wish to oppose the leave, and for appeal from the decision of the comptroller to the law officer, and making the leave to amend conclusive as to the right to amend. Then comes sub-s. 10, which, as amended by the Act of 1888, runs thus: [His Lordship read the sub-section.] It is upon this sub-section that our decision in the present case must turn. No doubt these words primâ facie seem to suspend the operation of all the foregoing provisions of the section pending action; but so to construe the words would, it is argued, lead to a result that could hardly have been intended by the Legislature, namely, that the jurisdiction to give leave to amend would practically never revive after this suspension. The very fact

that leave to amend had been applied for would import that some amendment was necessary. I do not say that every amendment asked for would be of such a character that the patent would be bad, unless leave to amend was granted, but very generally this would be the case. If this be a true view of the consequence of holding that, upon the presentation of a petition for revocation, the power of amendment necessarily comes to an end, I should say that we ought not to construe words capable of another construction so as to arrive at such a result, and, in my judgment, the words, "the foregoing provisions of this section do not apply when and so long as any action for infringement or proceeding for revocation is pending," are capable of being so construed that they may mean that the application for leave to amend, in the manner pointed out in the sub-sections of s. 18, shall not be made while an action is pending, and need not be so construed as that an application, properly made before action or proceeding, (and, it may be, carried on until the eleventh hour) would have to be suspended pending the action.

But I think it right before coming to this conclusion to consider the provisions of 5 & 6 Will. 4, c. 83, the first statute which enabled disclaimer to be made or any alteration beyond the small alterations which could be made by common law. Now, if that statute is looked at, it will be found that there is no provision in it for making terms or conditions of the leave to disclaim or enter a memorandum of any alteration in the title or specification, and that, although the disclaimer or alteration, when filed and enrolled with the specification, were to be deemed and taken to be part of the letters patent or specification in all Courts whatever, yet, as was held in *Perry* v. *Skinner* (1), the disclaimer had not a retrospective operation, so as to make a party liable for an infringement of a patent prior to the time of entering a disclaimer or memorandum of alteration, and the disclaimer or alteration was not receivable in evidence in any action or suit (save a scire facias) pending at the date of the disclaimer or memorandum, although the giving leave was discretionary. The Act of William IV.

(1) (1837) 2 M. & W. 471; 46 R. R. 656.

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also contained no express power of making conditions, whereas, under the Act of 1883, the amendment seems to be retrospective, and there is no provision for not giving the amended patent in evidence in a pending action even in a petition for revocation, the present form of scire facias. Sect. 19 of the Act of 1883 applies only to leave to apply for leave to amend by disclaimer, whatever that may mean, and conditions as to costs and otherwise may be imposed by the judge giving the leave to apply. It is true that the law officer, under sub-s. 4 of s. 18, has the power to impose conditions on the leave to amend, but I should doubt his power over the costs of a pending action. These considerations seem to me to militate against the construction we might adopt apart from them, and this construction is not necessary, if we read the words "correction or explanation" as applying only to alterations which could have been made at common law, and read the word "disclaimer" in s. 19 as meaning every amendment other than by correction or explanation. If we read s. 19 as excluding amendments other than amendments of the claims at the end of the specification, it follows that we must exclude from the section some claims going to the validity of the patent, and it is not easy to suggest any reason why leave should not be given by the judge in a pending action, on proper terms, to apply to the comptroller for leave to amend the specification in respect of such matters, just as much as to amend the mere claims, especially as the amendment of a claim must often necessitate the amendment of the specification also. The practical working of the statute, if we adopt the natural meaning of the words in sub-s. 10 of s. 18, and a non-natural but possible construction of the word "disclaim" in s. 19, will be, that if, after due advertisement, no one successfully objects before the comptroller or brings an action, the amendment, if granted, will form part of the original patent, but, if an action is brought, no amendment can be applied for without the leave of the judge. A petition for revocation, however, would fail, if the matter sought to be amended does not go to the validity of the patent.

I have thought it right to call attention to these considera-

tions, as militating against construing sub-s. 10, as amended by the Act of 1888, as not applying to cases where the leave to amend has been asked for, but not granted, before action or legal process. But yet I am not prepared to differ from the rest of the Court in holding that this construction presents less difficulty than any other. There are difficulties in any construction, and I may observe that, even if the other construction is adopted, the comptroller would seem to have had no jurisdiction to amend, unless and until the leave of the judge was obtained under s. 19.

STIRLING L.J. I have had an opportunity of reading the judgment which my brother Cozens-Hardy is about to deliver, and I entirely agree with it.

COZENS-HARDY L.J. read the following judgment:—The question raised by this appeal is whether proceedings, properly commenced by a patentee under s. 18 of the Patents, &c., Act, 1883, for amending his specification, are rendered invalid or suspended by the subsequent presentation of a petition for the revocation of the patent. Kekewich J. has held, as I think correctly, that the proceedings before the comptroller are in no way affected. Now s. 18 is obviously intended to enable a patentee, who finds that he has made a blunder in his specification, to go to the comptroller and ask to be relieved from the consequences of the blunder. The blunder may require a disclaimer, or a correction, or an explanation. Those three words plainly indicate different things. The section prescribes what public notice has to be given, and how objectors are to be heard, and provides for an appeal from the comptroller to the law officer. By sub-s. 9 leave to amend is to be conclusive as to the right to make the amendment allowed, and the amendment is in all Courts and for all purposes to be deemed to form part of the specification. In the present case the comptroller heard the patentee and also the defendants, and allowed the amendment. But this allowance was after the presentation of a petition by the defendants for the revocation of the patent. It is contended that, by virtue of

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sub-s. 10, the jurisdiction of the comptroller ceased on the presentation of the petition. I cannot adopt this view. Sub-s. 9 of s. 18 plainly shews that the literal interpretation of sub-s. 10, which is contended for, is inadmissible, for it is a provision expressly applicable when an action is pending. It seems to me that s. 18, which must be read with s. 19, states what a patentee may do before he is in litigation, and s. 19 states what he may do while he is in litigation. It is noteworthy that under s. 19 he cannot, even with the leave of the Court, apply for amendment, except by way of "disclaimer," as distinguished from "correction" or "explanation." I cannot hold that a patentee, who desires to amend by correcting a specification, which, unless corrected, would make the patent bad, is rendered helpless by the mere presentation of a petition for revocation, which, ex hypothesi, must succeed. The language of s. 19 is not apt for reviving suspended proceedings properly commenced. It points to an original application for leave to amend. It is somewhat remarkable that a patentee, who has not before litigation applied for leave to amend, can only apply during litigation to amend by way of disclaimer, and not by way of correction or explanation. But, whatever may be the reason for this limitation, it seems to me that, whenever proceedings are properly commenced before the comptroller, whether under s. 18, sub-s. 1, without the leave of the Court, or under s. 19, with the leave of the Court, all the provisions of s. 18, sub-ss. 2 to 9, apply. The result is that, in my opinion, this appeal must be dismissed with costs.

Moulton, K.C., asked for a stay of proceedings, with a view to an appeal to the House of Lords.

THE COURT refused the application.

Solicitors: *W. V. H. Cobbett; Field, Roscoe & Co.*

W. L. C.

WRIGHT *v.* CARTER.

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Oct. 28, 30; *Nov.* 1, 3, 4, 5, 17.

[1901 W. 4492.]

Solicitor and Client—Fiduciary Relation—Voluntary Settlement—Gift by Client to Solicitor—Sale by Client to Solicitor—Undue Influence—Consideration, Insufficiency of—Separate Solicitor, Duties of—Competent independent Advice—Gift to Children as well as to Solicitor—Severable Deed—Partial Avoidance—Trustee Solicitor-donee, Removability of—Limiting Avoidance to Beneficial Interest—Beneficiaries, Consent of—Form of Order setting aside Deed.

A gift by a client to his solicitor raises primâ facie the presumption that it was unduly influenced by the fiduciary relation subsisting between them; and the onus is on the solicitor to prove that the gift was uninfluenced by that relation. The presumption is, however, not irrebuttable, but it is not sufficiently rebutted by the mere fact of the client having employed a separate and independent solicitor—even though without any fraud or collusion on the part of the two solicitors—to advise him in the matter of the gift; for the presumption will continue so long as the relation of solicitor and client continues for other purposes outside the gift, or at all events until it can be clearly inferred that the influence arising from the relation no longer exists. On the other hand, there is no objection to a sale by a client to his solicitor, provided the solicitor can prove—(1.) that the client was fully informed; (2.) that he had competent independent advice; and (3.) that the price given was a fair one.

In 1900 the plaintiff, being in pecuniary difficulties, executed a voluntary deed giving part of his property in trust (subject to trusts thereby declared in favour of persons not parties) after his own death in certain shares for two of his children, who were sui juris, and for his solicitor, C., whom he expressed a wish to benefit for services rendered but not yet paid for. C. and one of the two children were the two trustees of the deed, and all three were parties to it. The draft of the deed had been prepared in C.'s office, though not under his supervision, but on his suggestion had been submitted by the plaintiff to a separate solicitor, A., to advise him in the matter, especially in respect of the gift to C., and the deed was executed by the plaintiff on A.'s advice. In all other matters C. continued to act for the plaintiff as before.

In 1901 the plaintiff executed another deed, to which the two children and C. were again parties, whereby the whole of the plaintiff's property, both present and future, was conveyed to the same trustees, discharged from the trusts declared by the deed of 1900 in favour of the two children and C., but to be held upon trust for the same three persons in equal shares, in consideration of a covenant by them to pay the plaintiff a certain annuity during his life. This deed also had been prepared by a separate solicitor, T., who, on C.'s suggestion, had been called in to advise the

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plaintiff in the matter. C. continued to act in all other matters for the plaintiff as before. No fraud or collusion was found as between C., A., and T. in either transaction, but in neither was A. or T., when advising the plaintiff, fully informed of his actual position or property.

In an action by the plaintiff to set aside both deeds:—

Held, (1.) that the deed of 1900 was void as against C., but not as against the children, since the benefits it conferred upon them had not been induced by any undue influence on the part of C.; and

Held, (2.) that the deed of 1901 was void altogether as being a transaction of bargain and sale entered into by the plaintiff without, as the evidence shewed, his having been properly advised as to the sufficiency of the consideration and without the advice of an independent solicitor fully cognizant of the facts.

Hatch v. *Hatch*, (1804) 9 Ves. 292; 7 R. R. 195, and *Holman* v. *Loynes*, (1854) 4 D. M. & G. 270, followed.

In the absence of some of the beneficiaries under the deed of 1900, the Court refused to remove C. from being a trustee thereof or to make a declaration as against him further than that the deed was void so far as related to his beneficial interest.

The law as stated by Farwell J. in *Powell* v. *Powell*, [1900] 1 Ch. 243, 247, as to the duty of a separate solicitor called in to advise a donor in the case of an intended gift to a donee standing in a fiduciary relation to the donor, approved of.

Form of declaration setting aside a deed.

THIS was an action by Colonel Charles Ichabod Wright to have certain instruments which conferred benefits upon the defendant, Mr. Francis John Carter, a solicitor, set aside as having been executed during the existence of the relation of solicitor and client.

Down to 1898 the plaintiff was the senior partner in a banking business at Nottingham. By an agreement of May 27, 1898, the firm sold the goodwill of the business, subject to the liabilities thereof, to the Capital and Counties Bank for 110,000*l*. By this agreement the bank were to be at liberty to reject any assets if they did not consider them of the value at which they stood in the books of the firm. All rejected assets were to be realized, and the amount by which they fell short of the value in the books of the firm was to be deducted from the purchase-money; and if the deficit exceeded the purchase-money it was to be made good by the partners of the firm. The plaintiff was entitled to two-thirds of the purchase-money, the amount to come to him out of the purchase-money, or (as the case

might be) his liability to make good any deficit of the rejected assets beyond 110,000*l.*, being dependent upon the realization of those assets. The bank rejected assets to the nominal value of 350,000*l.*, and these assets were still in course of realization.

At the date of the agreement the plaintiff was the owner of the Watcombe Park estate, Torquay, and of a one-third share of the Mapperly Hall estate, Nottingham, both being freehold estates; but he was subject to heavy liabilities under covenants contained in settlements in favour of his three daughters, two of whom were married (one being Mrs. Webb), for payment to the trustees of those settlements of large capital sums, the whole or the greater part of which was charged on the Watcombe estate; and he was also liable for the payment of an annuity of 1200*l.* a year to his wife under a separation deed. In addition, he was subject to the contingent unascertained liability to the Capital and Counties Bank under the agreement of May 27, 1898.

In 1895 the defendant, Carter, who was in business as a solicitor in Torquay, commenced to act in certain family and other matters as solicitor to the plaintiff, who was then residing at Watcombe Park; but in 1899 the plaintiff, finding that his financial affairs had got into a very complicated state, and being apprehensive that he might find himself under a heavy liability to the bank in respect of the rejected assets, consulted Carter especially with reference to his dealings with the bank, and from 1899 till August, 1901, Carter acted as his solicitor and confidential adviser in all his affairs. The plaintiff's family consisted of, besides the three daughters, two sons, one of whom was, at the date of the sale of the banking business to the Capital and Counties Bank, a partner in the firm, but the other son, Nevill Wright, was not in the firm.

In April, 1900, the plaintiff, who was then nearly seventy-two years of age, informed Carter that he wished to make a voluntary settlement upon himself, his unmarried daughter Blanche Wright, and his son Nevill Wright, with a view of preventing the whole of his property from being swept away by the bank; he also expressed his wish to confer some benefit upon Carter himself, who had as yet received nothing for his

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services; and he requested Carter to prepare the necessary deed. The scheme was eventually carried out by two deeds, each dated May 15, 1900. By the first of these deeds, which was made between the plaintiff, Nevill Wright, and Carter, after a recital (amongst others) of the desire of the plaintiff to make the settlements and provisions thereinafter expressed, "the provision in favour of the said F. J. Carter being induced and made in consideration of many services heretofore rendered by him to the said C. I. Wright," the plaintiff conveyed to Nevill Wright and Carter all the freehold hereditaments of which he was then possessed, subject to the charges thereon, upon trust for the plaintiff for life, and after his death for sale and conversion and investment of the proceeds; and the plaintiff thereby assigned to Nevill Wright and Carter the benefit of the agreement of May 27, 1898, and all his share in the rejected assets and the right to receive all moneys payable to the plaintiff under the agreement, or in respect of the rejected assets, upon trust to get in, convert, and invest the same, and to pay the income thereof to the plaintiff for life; and after his death the trust funds were to be held upon trust out of the income to pay the annuity of 1200*l.* payable to his wife under the separation deed, and out of the capital to pay the sum payable under the settlement of his daughter, Mrs. Webb, and, subject thereto, upon trust, as to nine-twentieths of the trust funds for his daughter, Blanche Wright, as to nine-twentieths for Nevill Wright, and as to the remaining two-twentieths for Carter.

By the second deed, after a recital (amongst others) that "the said F. J. Carter has rendered services to the said C. I. Wright which the said C. I. Wright is desirous of recognising and of settling on him the sum of 500*l.*," the plaintiff assigned to Nevill Wright and Carter all the furniture and chattels in and about Watcombe Park and Mapperly Hall upon trust to allow the plaintiff to enjoy the same during his life, and after his death upon trust for sale, and out of the proceeds to pay 500*l.* to Carter and to divide the residue equally between Blanche Wright and Nevill Wright.

Upon the plaintiff informing Carter of his wish to make the

dispositions of his property which were subsequently carried out by those two deeds, Carter told him that as he, Carter, was to take a benefit, the necessary deed or deeds must be prepared by another solicitor, and Carter then mentioned the names of four firms, amongst them Messrs. Eastley & Eastley of Torquay. The drafts, however, of the two deeds were in fact prepared in Carter's office by his managing clerk, but without Carter's supervision or interference, and they were finally settled by counsel. The plaintiff, having called at Carter's office and obtained the drafts so settled, took them, on May 7, 1900, to Messrs. Eastley's office; but as none of the partners were then accessible he was referred to their managing clerk, Mr. Almy, who was himself a solicitor, though it appeared he was unknown, except professionally, to Carter. The plaintiff then told Almy the reason he had called, and requested him to look through the drafts and advise him, and he left the drafts with Almy for that purpose. On May 10 the plaintiff called again, and after some discussion upon the terms of the drafts, in the course of which Almy pointed out certain objections upon them, the plaintiff said he would prefer executing the deeds in the form settled by counsel, and, according to Almy's account of the interview, dismissed his various suggestions. In his cross-examination at the trial of the present action Almy admitted that he understood the relation of solicitor and client between the plaintiff and Carter was being severed only so far as was possible, and that he knew the relation continued as regarded other matters; and he added, "I saw it was impossible absolutely to sever the relation." In re-examination Almy said that he told the plaintiff it was absolutely essential, if he intended to benefit Carter, that he should be free from Carter's influence; that the plaintiff led him very clearly to understand that he was absolutely free from that influence; and, further, that the plaintiff did not strike him as a man who would be likely to be influenced by Carter or anybody else. Eventually the deeds were engrossed and executed in the form already stated, and were then handed by Almy to Carter as being one of the trustees under them.

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After the execution of these deeds Carter continued to act for the plaintiff as before in the matter of the rejected assets; but the plaintiff's financial difficulties appeared to increase rather than diminish, the Capital and Counties Bank urging their claims more persistently and threatening to take legal proceedings; so that early in February, 1901, the plaintiff told Carter he could stand the worry and anxiety no longer, and that he feared the bank would make away with everything; and he expressed his desire of making over the whole of his property, including the rejected assets, to Nevill Wright, Blanche Wright, and Carter if they would undertake to pay him a fixed income of 500*l.* a year. Carter then told him, as on the previous occasion in 1900, that as his solicitor he could not himself carry out the transaction, and accordingly introduced him to a Mr. Tarbet, a solicitor of Exeter. Tarbet was not a personal friend of Carter's, and they were only known to each other professionally, and that but slightly. On March 9, 1901, Tarbet went over to Watcombe Park, when Carter, in the presence of the plaintiff and of Blanche Wright and Nevill Wright, gave him, Tarbet, verbal instructions for a deed which would carry out the plaintiff's wishes. Acting on those instructions Tarbet prepared the draft and had it settled by counsel, but apparently it was never sent to or seen by the plaintiff. The draft, which comprised only certain specified property of the plaintiff, was then engrossed, and on March 13 Tarbet took the engrossment to the plaintiff, whom he saw alone, for execution, and the plaintiff accordingly executed it; but either before or after its execution, and before Tarbet had left, the plaintiff read it over for himself. After he had read it over he said to Tarbet, "Cannot you put in a general clause so that they"—meaning the Capital and Counties Bank—"cannot get anything from me?" To which Tarbet replied that he did not think this could be done in a deed of that kind, and that any such clause would have to be settled by counsel, which would involve the necessity of the deed being re-engrossed. Early next day, the 14th, Tarbet saw Carter and told him of the previous day's conversation with the plaintiff, and also shewed him the draft, when Carter said that unless the plaintiff included everything he would not himself sign the deed, and

would certainly advise Blanche Wright and Nevill Wright not to do so; whereupon, on the same day, Carter and Tarbet went to see counsel to have the draft resettled by the insertion of a clause including the whole of the plaintiff's property, future as well as present, and counsel so resettled the draft. The draft was then re-engrossed in that form, and on the evening of the 14th Tarbet took the engrossment to the plaintiff for execution, telling him that it contained a general clause such as he desired. The plaintiff, being apparently satisfied, then executed the engrossment, but without reading it over either before or after doing so. It was afterwards executed by Carter, Blanche Wright, and Nevill Wright, and was then handed by Tarbet to Carter as being a trustee under it. It did not appear that in carrying out the transaction Tarbet was ever made acquainted with the plaintiff's true financial position, or with the actual amount of his income, or with the value of his property.

The deed was dated March 14, 1901, and made between the plaintiff of the first part, Nevill Wright and Carter of the second part, and Blanche Wright, Nevill Wright, and Carter (thereinafter called "the reversioners") of the third part, and it was expressed to be supplemental to the first of the two deeds of May 15, 1900. It was witnessed that, in consideration of the joint and several covenants by the reversioners thereinafter contained, the plaintiff as beneficial owner, and for the purpose as well of confirming the disposition made by the principal deed (as altered by the present deed in respect of the shares or proportions in which they should be respectively entitled to the premises) as of vesting in the reversioners the beneficial interest in the trust premises during the life of the plaintiff, the plaintiff and the reversioners thereby declared and directed that Nevill Wright and Carter, as trustees, should stand possessed of the trust premises comprised in the principal deed freed and discharged from the trusts in favour of the plaintiff and the reversioners respectively declared by the principal deed, but subject to the trusts by the principal deed declared for the payment of the annuity payable to the plaintiff's wife and for the payment of the capital sum to the trustees of the settlement of his married daughter, Mrs. Webb, upon trust for the reversioners

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in equal shares; and the plaintiff as beneficial owner thereby conveyed all his freehold estates "not comprised in the principal deed," also all his personal estate, "and all other properties which the said C. I. Wright may now be or hereafter become entitled to or acquire" (that being the clause inserted by counsel on resettling the draft), to Carter and Nevill Wright (subject to all charges and incumbrances affecting any of the said premises) upon the trusts to which the same would, by the joint operation of the principal deed and the present deed, be subject if the premises thereinbefore conveyed had formed part of the trust premises subject to the principal deed, and if the trust for payment of the annuity to the plaintiff's wife for the raising and payment of the capital sum to the trustees of the settlement of the married daughter had been omitted therefrom (*sic*); and the present deed contained joint and several covenants by Carter, Blanche Wright, and Nevill Wright for payment to the plaintiff of an annuity of 500*l.* a year, to be increased to 800*l.* in a certain event.

Apparently by an oversight the second deed of May 15, 1900, which related to the furniture, was not affected by the deed of March 14, 1901, and on July 13, 1901, the plaintiff executed a further document in the form of an agreement (not under seal) expressed to be supplemental to the second deed of May 15, 1900. The effect of this agreement was that a portion of the furniture was to be purchased by Blanche Wright at a valuation, and that the rest was to be sold forthwith and the proceeds applied, in the first instance, in paying 200*l.* to the plaintiff, in lieu of his life interest in the furniture under the second deed, and 425*l.* to Carter, the balance to be divided equally between Blanche Wright and Nevill Wright; and in consideration of the said sum of 200*l.* the plaintiff released his life interest in the furniture.

On this occasion also Tarbet advised the plaintiff, though the agreement itself was prepared neither by him nor by Carter, but by a London firm of solicitors purporting to act on behalf of the trustees of the deed to which it was expressed to be supplemental. None of the four instruments in question contained any power of revocation.

After the execution of the deed of March 14, 1901, and the agreement of July 13, 1901, Carter continued to act as before as the plaintiff's solicitor in various matters, including the realization of the rejected assets.

In September, 1901, the plaintiff brought this action against Carter, Blanche Wright, Nevill Wright, Tarbet, and Almy, claiming to have the two deeds of May 15, 1900, the deed of March 14, 1901, and the agreement of July 13, 1901, set aside, with consequential relief; and he also claimed damages for alleged fraud and fraudulent conspiracy as between the defendants Carter, Tarbet, and Almy. The plaintiff's main ground of action was that he had executed the several instruments in question without independent advice; that he had been induced to execute them by the influence of Carter and by his misrepresentation of the extent of the pressure put upon him, the plaintiff, by the Capital and Counties Bank; and that Almy and Tarbet had, as he alleged, been acting in concert with Carter.

In his statement of defence Carter insisted that the several documents were executed by the plaintiff under the full, competent, and independent advice of separate solicitors, and he denied that there had been any fraud, collusion, or impropriety in the matter between himself, Almy, and Tarbet. It appeared that the plaintiff had received sums on account of the annuity payable to him under the deed of March 14, 1901, and his acceptance of those sums Carter relied upon as constituting acquiescence in and ratification of the impeached transactions.

The defendant Blanche Wright, in her statement of defence, said that she was living with her father, the plaintiff, at the time the several documents were executed, and that, in so far as she had been concerned in the transactions, she had acted in the belief that the documents were carried out with the full consent and knowledge and at the wish and instance of the plaintiff acting under independent advice, and that the same were in all respects to his benefit and to his interest.

The defendant Nevill Wright, in his statement of defence, said that the real circumstances of the case only came to his knowledge in August, 1901, and that he was then satisfied that

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the several documents ought to be cancelled. He offered to reconvey his beneficial interest under the several documents to the plaintiff. As trustee, he submitted to act as the Court should direct.

The defendant Tarbet, in his statement of defence, alleged that he advised the plaintiff upon the deed of March 14, 1901, honestly and to the best of his ability, and entirely independently of Carter or of any other of the defendants, and that the advice he gave was, in the circumstances of the case, right and proper and in the best interest of the plaintiff; that the plaintiff read through the deed himself [the evidence shewed, as above stated, that the plaintiff read through, not that deed, but the abortive deed of the previous day, which was in substance the same with the omission of the general clause added pursuant to the plaintiff's desire]; that its effect was fully explained to the plaintiff by him, Tarbet; and that the plaintiff thoroughly understood its contents and effect before executing it. He denied all collusion with Carter.

The defendant Almy, in his statement of defence, alleged that he carefully discussed with the plaintiff the contents of the drafts of the two deeds of May, 1900, and particularly his reasons for proposing to benefit Carter, and that the plaintiff fully understood the deeds before he executed them; that the plaintiff informed him that he was under certain financial liabilities, but did not state them in detail; that he, Almy, was fully alive to the nature and extent of his duty and obligation as acting for and advising the plaintiff in the matter, though he admitted that he "knew nothing about the position or affairs of the plaintiff, or of the relation between the plaintiff and the defendant Carter, except what he learnt from the documents he had perused, and except what the plaintiff told him"; but he, Almy, said he considered that his information was ample for the purpose, and that he ascertained every matter necessary for him to know in order to give the plaintiff proper advice, which he did in fact, as an independent solicitor, give to the plaintiff. He denied any collusion with Carter, whom he had never known except professionally.

The plaintiff having joined issue, the action came on for

trial. The trial occupied several days in December, 1901, during which several witnesses were examined and cross-examined, including the plaintiff, and the defendants Carter, Nevill Wright, Tarbet, and Almy, but not the defendant Blanche Wright. The general effect of the evidence appears from the facts above stated, from the arguments, and from the judgments of the Court of Appeal.

On January 21, 1902, Kekewich J., in a considered judgment, dismissed the action with costs as against all the defendants other than Nevill Wright, who had supported the plaintiff. His Lordship held that the charges of fraud against Carter, Tarbet, or Almy had not been established. He thought that, if nothing more had happened, the deeds of May, 1900, must have been set aside on the ground that they conferred a benefit on Carter, and that his client had not sufficient competent and independent advice. The circumstances precluded the possibility of such advice being given. The deeds of 1901 could not be treated as a confirmation of the prior transaction, because the plaintiff did not know that it was voidable. But, in his Lordship's opinion, the plaintiff's right to avoid the deeds of 1900 was gone, not because he had confirmed them, but because he had by the deeds of 1901 abrogated them and agreed that they should be treated as a nullity. To allow him now to go back and say that the deeds of 1900 were still operative, and, because originally voidable, ought now to be avoided, would be inequitable.

The plaintiff appealed against the judgment so far as regarded the defendants Carter, Blanche Wright, and Nevill Wright.

The appeal was heard on October 28, 30; November 1, 3, and 4.

It was stated at the bar that the furniture comprised in the second deed of May 15, 1900, and the agreement of July 13, 1901, was ultimately sold, and that out of the proceeds Carter had, since the judgment in the action, received, as he in fact admitted, the 425*l.* payable to him under that agreement.

Warrington, K.C., and *A. àB. Terrell*, for the plaintiff. First, with regard to the deeds of May, 1900, it is submitted that,

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taking them alone, the learned judge was right in holding that they could not stand, since the relation of solicitor and client, as between Carter and the plaintiff, was not severed at the time. Carter's influence as solicitor still operated, although the plaintiff, under Carter's advice, went through the form of consulting a separate solicitor, Almy, to advise him in the transaction. But Almy had not sufficient materials before him—such as the amount of the plaintiff's income, the particulars and value of his property, and the nature and extent of his liabilities; so that he was unable to give the plaintiff, and did not in fact give him, competent advice in the matter.

[VAUGHAN WILLIAMS L.J. Supposing you are right as against Carter, why should not the deeds stand so far as Blanche Wright and Nevill Wright are concerned?]

In the case of a voluntary deed, if any part is invalid, it must go as a whole, for it is impossible to predicate what the settlor's particular intention would have been if one part of the deed had, in fact, no operation. The case of a contract is different: there the Court will rectify if necessary, so as to carry out the real contract between the parties.

Then with regard to the deed of March, 1901, the effect of it was not and could not be fully and properly explained to the plaintiff by Tarbet, who, just as in the case of Almy, had not the materials to enable him to give the plaintiff competent advice in so important a matter. That deed was in effect a purchase by Carter, a solicitor, from the plaintiff, who was his client; and in such a case the onus is on the solicitor to shew that everything was done for the protection of the client which would have been done if the relation of solicitor and client had not existed between them. The defendant Carter has not discharged this onus.

If the deed of March, 1901, is valid as an independent transaction, it would be of advantage to the plaintiff to set aside the first deed of May 15, 1900, to which it relates. But it is submitted that the deed of March, 1901, cannot stand as a purchase by a solicitor from his client, or as a contract for value between solicitor and client. Treating it as a purchase, the vendor and purchaser were not at arm's length. Although in

form and for some purposes the vendor was separately advised, still the influence of Carter as the vendor's solicitor necessarily continued. Admitting that the effect of the deed was explained to the plaintiff, and that he knew what he was doing, still he had not that protection which he ought to have had. As regards the property which was to be included in the deed, the evidence shews that it was Carter—not Tarbet—who was conducting the matter. Tarbet supposed that he was only carrying out that which had been already arranged; he did not suppose that he was negotiating. As regards the parcels in the deed, he obtained his information mainly from Carter: it was Carter who told him that the plaintiff's after-acquired property was to be included in the deed. And, as to the consideration for the sale, Tarbet was told that it had been arranged that Carter's covenant to pay the plaintiff an annuity of 500*l.* was to be the consideration. Tarbet apparently took no steps to ascertain whether that was an adequate consideration. He did not know the value of the property which was to be included in the deed. The principle applicable to the case was clearly stated by Kindersley V.-C. in *Tomson* v. *Judge* (1) thus: "A solicitor can purchase his client's property, even while the relation subsists; but the rule of the Court is, that such purchases are to be viewed with great jealousy, and the onus lies on the solicitor to shew that the transaction was perfectly fair; that the client knew what he was doing, and in particular that a fair price was given, and of course that no kind of advantage was taken by the solicitor." Carter is bound to shew that proper advice as to the value of the property was given to the plaintiff. He seeks to support the transaction by saying that independent advice was given to the plaintiff. But that advice was not "competent" or sufficient, because Tarbet had no knowledge of the value of the property.

The deed of March, 1901, ought to be set aside, not only as against Carter, but in toto. If it is set aside as against Carter alone, the Court will be making a new bargain. If the bargain is to any extent by reason of the relation in which Carter stood

(1) (1855) 3 Drew. 306, 313.

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to the plaintiff, it must be vitiated altogether: *McPherson* v. *Watt*. (1)

On another ground the deed of March, 1901, ought to be set aside, namely, because it included the right (if any) which the plaintiff had to set aside the deed of May, 1900. If the latter deed was voidable, this inclusion would invalidate the deed of March, 1901, for the plaintiff was not informed that the deed of May, 1900, was voidable.

The receipt of the annuity of 500*l*. by the plaintiff cannot operate as a confirmation of the transaction, if the plaintiff was ignorant of his rights.

Assuming, then, that the deed of March, 1901, cannot stand as an independent transaction, the first deed of May, 1900, operated as a gift by the plaintiff to his solicitor. In a case of gift the rule of the Court is more stringent than in a case of purchase. A gift by a client to his solicitor cannot be supported, unless it is shewn that, at the time when it was made, the influence which is presumed to arise from the relation of solicitor and client had come to an end. No independent advice which is given to the client can be competent or sufficient so long as that relation continues. In the present case it is plain that the influence of Carter over the plaintiff remained; and indeed the arrangement was made before Almy was called in to advise the plaintiff.

[VAUGHAN WILLIAMS L.J. Had Carter delivered a bill of costs to the plaintiff?]

No. But there was no agreement on his part not to charge costs. The policy of the law is against the payment to a solicitor of any other than his legal remuneration.

[STIRLING L.J. In *Hatch* v. *Hatch* (2) Lord Eldon said: "It is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand, purporting to be bounty for the execution of antecedent duty."]

In *Tomson* v. *Judge* (3) Kindersley V.-C. said much the same thing. If it is said that such a transaction can be

(1) (1877) 3 App. Cas. 254, 264. (2) 9 Ves. 292, 296; 7 R. R. 195.
(3) 3 Drew. 306, 314.

supported had the client received competent independent advice, that must mean—had he been advised altogether independently of the solicitor who takes the gift. This rule of the Court would be reduced to an absurdity if a gift by a client to his solicitor, made while the relation is still subsisting, can be supported merely because another solicitor was called in. In no reported case of the kind has the Court held that there has been such advice as would support the gift. In *Rhodes* v. *Bate* (1) Turner L.J. said that "where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shewn in order to determine it." And in *Holman* v. *Loynes* (2) Turner L.J. said: "Gifts from clients to their attornies can be maintained only, when not only the relation has ceased but the influence may rationally be supposed to have ceased also." The mere fact that a client is going to make a gift to his solicitor imposes on the solicitor an obligation to give him, or to see that he has, proper advice. The rule is founded on the confidence which arises from the relation. In the present case it is plain that there was not competent independent advice. The deed had been actually prepared in Carter's office before Almy was employed at all. The rule has been adopted because it is impossible to analyze a man's mind and ascertain how far it has been affected by the influence.

A voluntary deed, if set aside, must be set aside in toto: *Huguenin* v. *Baseley* (3); *Barron* v. *Willis*. (4)

[STIRLING L.J. It is difficult to see why the plaintiff's son and daughter should lose the benefits conferred on them by the deed. There is nothing to shew that Carter used any influence in their favour.]

That may be admitted, but still the whole transaction is affected by the fact that the plaintiff was not informed by Carter of the value of the property. If a voluntary transaction is bad in part, it is impossible to say what the donor would have done had he known that. The Court cannot give effect

(1) (1866) L. R. 1 Ch. 252, 260.
(2) 4 D. M. & G. 270, 283.
(3) (1807) 14 Ves. 273, 288; 9 R. R. 276.
(4) [1900] 2 Ch. 121; [1902] A. C. 271.

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to part only of the donor's intention. If the deed is set aside as regards Carter only, the plaintiff's life interest will remain, and he will be absolute owner of two-tenths of the reversion. That is not what he intended.

If necessary, the plaintiff would be willing that the judgment should be without prejudice to the rights of his wife and the trustees of the settlement of the married daughter mentioned in the deed.

Badcock, K.C., and *Marcy*, for the defendant Nevill Wright.

Warmington, K.C., and *Christopher James*, for the defendant Carter. The case made by the plaintiff in this Court differs from that which was raised by the pleadings. The defendant Carter was charged with a fraudulent scheme.

[VAUGHAN WILLIAMS L.J. The learned judge has relieved from that charge. But can the transaction stand, having regard to the confidential relation which is shewn to have existed?]

The rule which is applied to a gift made by a client to his solicitor is thus stated by Turner L.J. in *Rhodes* v. *Bate* (1): "I take it to be a well-established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." That rule has been recognised in a number of other cases. The basis of the rule is, as said by Lord Eldon in *Huguenin* v. *Baseley* (2), the "undue influence," that is, the presumed influence of the solicitor upon the client. But a series of cases shews that the presumption of influence may be rebutted: *Walker* v. *Smith* (3); *In re Holmes' Estate* (4); *Allcard* v. *Skinner*. (5) Here the presumption is rebutted, because it is shewn that the plaintiff had competent independent advice.

No doubt, the rule is that it is not enough to shew that the client understood what he was doing: *Liles* v. *Terry* (6) The

(1) L. R. 1 Ch. 257.
(2) 14 Ves. 296.
(3) (1861) 29 Beav. 394.
(4) (1861) 3 Giff. 337, 345.
(5) (1887) 36 Ch. D. 145.
(6) [1895] 2 Q. B. 679.

solicitor-donee must shew that the client-donor has had independent advice: it is not enough for the donee to tell the donor that he must go to a separate solicitor; he must actually see that he does so: *Barron* v. *Willis*. (1) But there is no rule that under no circumstances whatever can a gift be made to a person standing in a confidential relation to the donor. The true rule is laid down in *Rhodes* v. *Bate* (2), as stated by Lord Selborne in *Mitchell* v. *Homfray* (3), namely, that to uphold such a gift the donor must have had competent independent advice. In short, the donation must be the act of the unbiassed mind of the donor; the only requirement is that the will of the donor shall have been freely exercised. For instance, in the case of guardian and ward, if after the relation has terminated, and the child or ward has had independent advice and has had sufficient time to think for himself, a gift made during the existence of the relation may be upheld: *Smith* v. *Kay* (4) Now, applying that to the first deed of May, 1900, the evidence shews that Carter not only told the plaintiff to consult a separate solicitor, but gave him the names of several to select from; that Almy, the solicitor to whom the plaintiff went and who was almost unknown to Carter, did discuss the matter with the plaintiff and explained to him the effect of what he was proposing to do; and that the plaintiff seemed fully to understand. Therefore the legal presumption of undue influence on the part of Carter, so far as regards the execution of that deed, is sufficiently rebutted.

[VAUGHAN WILLIAMS L.J. There is no evidence that either Carter or Almy ever told the plaintiff that his intended gift by that deed would not protect him against the claim of the Capital and Counties Bank. On the contrary, the evidence shews that Almy told the plaintiff that it would protect him. How, then, can it be said that the plaintiff had full information as to his position, or fully understood it?]

The plaintiff's main motive was not so much to protect himself as to prevent his wife and children being pauperised by any action on the part of the bank.

(1) [1899] 2 Ch. 578; [1900] 2 Ch. 121; [1902] A. C. 271.
(2) L. R. 1 Ch. 252.
(3) (1881) 8 Q. B. D. 587, 591.
(4) (1859) 7 H. L. C. 750, 772.

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The settlement is a good settlement while it stands, and its validity as between the parties to it is not affected by the fact that some one outside may have good ground for impeaching it. It does not necessarily follow that creditors will upset a settlement of this kind.

[COZENS-HARDY L.J. I do not find any evidence that the plaintiff was told, "Notwithstanding this settlement the Capital and Counties Bank can deprive you of everything."]

We admit that that information was not given to the plaintiff either by Carter or Almy; but that is a matter outside the settlement itself.

[VAUGHAN WILLIAMS L.J. Almy did not tell the plaintiff that the rejected assets would not realize sufficient to relieve him from his obligations.]

No; but the plaintiff well knew, when he made the settlement, that there would be a large deficiency. It is the mind of the donor or settlor that has to be considered.

[VAUGHAN WILLIAMS L.J. But the fact was not present to the mind of the independent adviser.]

It was to the mind of the person to be advised.

[VAUGHAN WILLIAMS L.J. That is not the same thing.]

The Court must not assume that the independent solicitor did not do his duty. The deficiency in the assets was the foundation of the whole transaction; it is impossible to suppose it was not discussed between Almy and the plaintiff. It must be assumed throughout that the two deeds of May, 1900, had express relation to the rejected assets.

The real question is, What is the extent of the independent advice that can validate a gift by a client to his solicitor? There can be no question here that Almy was free from any influence by Carter: he was neither Carter's friend nor nominee; so that he was not under any personal incapacity on those grounds. It is, therefore, submitted that the plaintiff's adviser in this matter was both competent and independent. There is no rule that the donee-solicitor should interpose and see that the proper advice is given by the person competent to give it, or that he must take the risk of the advice so given. All that he has to do is to see that the donor gets into the hands of an independent solicitor.

Next, with regard to the deed of March 14, 1901, that stands in a different position to the deeds of May, 1900, for it was not a voluntary settlement but an instrument of purchase; and there is no rule that a solicitor cannot buy from his client. The validity of such a transaction depends upon circumstances. The rule that the onus of proof that the client received all reasonable advice against himself from the purchasing solicitor does not apply where the solicitor is not the solicitor in hac re: *Edwards* v. *Meyrick* (1); *In re Haslam and Hier-Evans.* (2)

Here, the evidence shews that Tarbet undertook to act as the plaintiff's independent solicitor in this matter; that the plaintiff had full advice from him; and that Tarbet was bonâ fide independent of any influence, and competent to counteract any influence, on the part of Carter, and in fact did his duty. Thus Carter was not the solicitor to the vendor in hac re, and, therefore, this purchase by Carter cannot be impeached.

[COZENS-HARDY L.J. Turner L.J., in *Holman* v. *Loynes* (3), appears to negative the proposition that a purchase by a solicitor from his client can be maintained provided he is not the solicitor in hac re, for he says: "The very ground of the rule which requires attornies purchasing from their clients, and not advising them with reference to the purchase, to prove that the confidential relation has been determined or the client put at arm's length, is the influence which arises from the position of attornies; and I much doubt whether the confidential relation can be said to be determined at all, whilst the influence derived from it can reasonably be supposed to remain."]

There is nothing objectionable in a solicitor being a vendor or purchaser, provided he fully advises his client upon the terms of the bargain: *Cockburn* v. *Edwards.* (4) There is nothing in the cases to shew that, when a competent independent solicitor is engaged, a transaction by a client with his regular solicitor cannot be carried out. When the client-vendor has the benefit of the services of a separate solicitor who cannot

(1) (1842) 2 Hare, 60, 70.
(2) [1902] 1 Ch. 765, 770.
(3) 4 D. M. & G. 270, 283.
(4) (1881) 18 Ch. D. 449, 455, 460, 462.

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be said to be in collusion with the solicitor-purchaser and is neither manifestly incompetent nor oblivious of his duty, but has done his duty—as Tarbet did in this case—there is no rule that the transaction cannot stand: *Pisani* v. *Attorney-General of Gibraltar.* (1) When, as here, the second solicitor is bargaining with the solicitor-purchaser, the rule that the onus of proving adequate consideration lies on the latter does not apply.

[VAUGHAN WILLIAMS L.J. There was no negotiating at all. The plaintiff simply said, "Sweep in everything." Tarbet did not go into the question of the quantum of the annuity the plaintiff was to receive or into any of the details of the plaintiff's present or future prospects, his property or his liabilities.]

Tarbet only accepted the bargain as concluded because the plaintiff expressed his determination to carry it out in spite of his, Tarbet's, advice.

Duke, K.C., and *Hon. Frank Russell*, for the defendant Blanche Wright. The gifts made by the several instruments in question can only be attacked on the ground of the confidential relation between solicitor and client; and it is said on behalf of the plaintiff that, there being mischief in the case on this ground, the whole of the transactions must fall; but there is no authority to be found for that broad proposition. Even assuming that Carter is in the wrong, that is, that he obtained gifts or benefits from his client during the existence of the confidential relation, that has nothing to do with the gifts made by the plaintiff to his own children. The contention that a deed making a gift to children cannot stand, because it also makes a gift to the donor's solicitor, is entirely contrary to the principles laid down in *Huguenin* v. *Baseley* (2), and *Bridgman* v. *Green* (3), there cited. The judgments in those cases were directed against gifts obtained by undue influence; and the question here is, Were these gifts obtained by undue influence? It is admitted that there was no undue influence on the part of the children benefited, and therefore, as regards them, there is an end of the matter.

(1) (1874) L. R. 5 P. C. 516.
(2) 14 Ves. 273; 9 R. R. 276; 1 W. & T. 7th ed. p. 247.
(3) (1755) 2 Ves. Sen. 627; (1757) Wilm. 58.

It cannot be pretended that if the gifts to the three donees had been made by three separate deeds, the deeds in favour of the donor's two children could be set aside on account of any invalidity in the deed in favour of the third donee, the solicitor: and it can make no difference whether the gifts are made by one deed or three. A gift to a solicitor in the course of his employment does not vitiate every cotemporaneous transaction. In *Barron* v. *Willis* (1) it was found as a fact that the solicitor had obtained a benefit for his son: the gift was one transaction. But that is not the case here, and a case of this kind must be dealt with on its own footing. In *Bainbrigge* v. *Browne* (2) it was held that the inference of undue influence, though it may operate against the donee who stands in the fiduciary relation, and against every person claiming under him, operates against no others. Miss Wright does not claim under Carter at all; and the plaintiff himself does not complain of these deeds except in so far as they relate to Carter. This Court, therefore, will not deprive Miss Wright of the benefits clearly intended for her. Accordingly we submit that, even if the deeds are void as against Carter, they are not void as against Miss Wright.

Warrington, K.C., in reply. It is not enough to shew that another solicitor was called in to advise as to the particular transaction. The transaction of March 1901, though in form a purchase, was not a purchase in the true sense. There was no bargaining about the price. It is not shewn that a fair price was given by Carter. It was his duty to give his client all the information which he had and the client had not. Tarbet apparently made no inquiry as to the value of the property, and Carter gave him none; so that, for want of knowledge of the value, Tarbet was really not in a position to bargain with Carter. There is no explanation how it came about that more property was included in the deed of 1901 than in that of 1900, or how it was that all the plaintiff's property, present and future, was included. Practically this was done by Carter himself. No doubt the plaintiff assented to this; but it was never pointed out to him that the effect would be to deprive him, e.g., of

(1) [1900] 2 Ch. 121, 137. (2) (1881) 18 Ch. D. 188, 196–7.

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anything which might come to him unexpectedly by the death of a relative. Nor did the plaintiff appreciate the change which the deed of 1901 made with regard to his liability to his wife and the trustee of his daughter's settlement. His liability remained, while he parted with the very property which would enable him to discharge it. It is submitted that Carter has not discharged the onus which is cast upon him, and that the deed of March, 1901, must be set aside, and in toto.

Then as to the first deed of May, 1900, that was a pure gift by the plaintiff to Carter. The case is one in which, as Lord Eldon said in *Hatch* v. *Hatch* (1), "it is almost impossible that the transaction should stand." The plaintiff had not "competent and independent advice"—that is, advice which would counteract the presumed influence arising from the relation of solicitor and client. Almy's advice was not competent, because he had not in his possession the materials which would enable him to give the advice. As Farwell J. said in *Powell* v. *Powell* (2), "the donee must shew (and the onus is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation." And, as Turner L.J. said in *Rhodes* v. *Bate* (3), the advice must be "in conferring" the gift, i.e., whether it should or should not be conferred.

The deed ought to be set aside altogether, for there was one motive affecting the whole arrangement, namely, the plaintiff's position in relation to the Capital and Counties Bank.

Cur. adv. vult.

Nov. 5. VAUGHAN WILLIAMS L.J. stated the facts of the case down to the execution of the two deeds of May 15, 1900, and, with reference to the preparation and execution of those deeds, said he had arrived at the conclusion that there was nothing in the evidence which suggested either that Carter had employed Almy as his tool, or that Almy had accepted any such position. His Lordship proceeded:—Dealing first with those two deeds alone, I agree with Kekewich J. that they cannot stand. I

(1) 9 Ves. 296. (2) [1900] 1 Ch. 243, 245.
(3) L. R. 1 Ch. 257.

desire now to state shortly the ground upon which these deeds cannot stand. We have had a great many authorities cited to us, and I do not say that they have not, one and all, a direct bearing upon the question we have to decide; but I do not think it necessary to go through them all at length. I propose only to touch more or less upon certain landmarks in the current of authorities.

I will begin with *Hatch* v. *Hatch* (1), decided by Lord Eldon in 1804. I do not think that any abridgment in my own language of what Lord Eldon said will really be a saving of time, so I will read his words. He says this (2): "This case proves the wisdom of the Court in saying, it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand, purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one, that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the cestui que trust, taking it into his fair, serious, and well-informed, consideration, were to do an act of bounty like this. But the Court cannot permit it; except quite satisfied, that the act is of that nature, for the reason often given; and recollecting, that in discussing, whether it is an act of rational consideration, an act of pure volition, uninfluenced, that inquiry is so easily baffled in a Court of justice, that instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind, misled by undue kindness, or forced by oppression; the difficulty of getting property out of the hands of the guardian or trustee thus increased; and therefore, if the Court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud; where the connection is not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the guardian or trustee."

Now I do not intend to affirm that that judgment of Lord Eldon's at the present day stands, having regard to the subsequent authorities, in all its stringency; but, on the other hand,

(1) 9 Ves. 292; 7 R. R. 195. (2) 9 Ves. 296.

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I do not think that in applying that judgment to the facts of the case now before us it is at all necessary that I should say that the subsequent authorities have altered or modified the view expressed by Lord Eldon. Now Lord Eldon was there dealing with the case of a gift; and it is perfectly plain that in the case of a gift the rule applied by the Court of Equity is much more stringent, is more absolute, than the rule that is applied in the case of a bargain or a contract. The principle that I understand Lord Eldon to be affirming is this—that whenever you have these fiduciary relations (and in the present case we have to deal with the particular fiduciary relation of solicitor and client), the moment the relation is established, there arises a presumption of influence, which presumption will continue as long as the relation, such as that of solicitor and client, continues, or at all events until it can be clearly inferred that the influence had come to an end. Now I am not saying that the presumption of influence affecting or avoiding the gift is an irrebuttable presumption: I do not think that the cases go that length, and I do not think that Lord Eldon meant so to lay down. To my mind, all that he means is that, so long as this fiduciary relation continues, so long will it be very difficult to support the gift, and so long will the Court refuse to go into nice discussions as to whether the gift—taking the case of a gift by a client to his solicitor—was a gift which was advantageous to the client or whether it was not. I do not mean to say that, if the gift to the solicitor is manifestly one which a prudent man would not have given supposing the relation of solicitor and client to have determined in hac re, such a fact may not be taken into consideration as shewing that, notwithstanding the determination of the actual relation, or (as the case may be) the non-employment of the solicitor in the particular matter, it is obvious that the influence of the solicitor had not ceased, but, on the contrary, had still continued. So, on the other hand, the fact that the gift is a very trifling gift, or a gift made by a man with so ample a fortune that it must have been trifling to him, is a matter which might fairly be taken into consideration in considering whether the influence continues. Now, I mention this because, when you

examine the later authorities, you find nowhere, as far as I can discover, anything that in terms qualifies or disapproves of the judgment of Lord Eldon in *Hatch* v. *Hatch*. (1) You do find, however, later authorities in which, even with regard to a gift, the fact that the donor of the gift had competent independent advice seems to have been considered as a matter which was material not only in dealing with a bargain but also with a gift; and I think that in one of the earlier cases the view taken of the judgment of Lord Eldon in *Hatch* v. *Hatch* (1) was that the fact of having independent competent advice was immaterial in the case of a gift; but Lord Eldon does not say so, and as I understand his judgment—at all events, in a case in which there is no continued employment in hac re—such a fact as the client having had competent independent advice would be relevant as leading to a reasonable and proper inference that the influence of the solicitor had ceased to operate.

Now, having said thus much about *Hatch* v. *Hatch* (1), I propose to state how I apply Lord Eldon's rule to the present case. In my judgment, the desire of Colonel Wright to execute these deeds was very much promoted by the pressure which he was undergoing from the Capital and Counties Bank. I think it is manifest that at this time he was feeling very much the pressure of being short of money at the moment, coupled with the prospect of remaining short of money for the rest of his life, and dying short of money. At all events, be that how it may, I cannot conceive but that any prudent man, whether a professional adviser or otherwise, on being asked by Colonel Wright to advise him as to whether he should make these two reversionary gifts to his solicitor—that is to say, the gift of 500*l.* and the gift of the two-twentieths—would at once have said to him, "I cannot advise you as to that unless I know what your means are, and what your prospects are. I must also know what income you are now receiving, and whether you have any reason to suppose that at the time these gifts are to come into operation it will be larger; and I should for that purpose like to have a list of your property—a full account of the property whatever its nature," of course including in this particular

(1) 9 Ves. 292; 7 R. R. 195.

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case a full account of the rejected assets and the equities of redemption. [His Lordship then referred to the evidence as to the extent of the advice given by Almy to the plaintiff, and said that, although it appeared that Almy intended to do his duty as the plaintiff's legal adviser, he had not the materials to enable him to do so effectually: that he was in a state of ignorance as to the plaintiff's true financial condition, and that in fact he was not in a position to do more than ask the plaintiff the questions he did, namely, whether he, the plaintiff, knew what he was doing, whether he understood he was making the reversionary gifts in question, and whether he was doing so of his own will and volition. His Lordship was of opinion that this was not sufficient to constitute competent independent advice, and that no one was in a position to give the plaintiff competent advice unless he knew a great deal more of the plaintiff's affairs than Almy did. His Lordship proceeded:—]

It does not seem to me that in this case the onus which clearly is thrown upon the solicitor by *Hatch* v. *Hatch* (1) has in the slightest degree been discharged. In my judgment, Mr. Carter has failed to satisfy us that these deeds were executed free from any influence of the solicitor. One must not forget that Mr. Carter was advising Colonel Wright in the whole matter, and the very fact that Mr. Carter was a party to these deeds being carried through was in itself a fact reasonably inducing Colonel Wright to suppose that the solicitor whom he had trusted so much, and whom he had trusted throughout this transaction, approved of what he was doing and thought it was a reasonable and prudent thing for him to do. I am perfectly clear that the circumstances of this case are such that Mr. Carter has not discharged the onus which is thrown upon him of shewing that his influence did not operate with regard to this gift. I am perfectly clear that the influence need not take the form of a direct persuasion to make the gift. If I had to deal with that question, which I have not, I think it right to say that I can find no evidence shewing that Mr. Carter directly persuaded Colonel Wright to make this present. On the other hand, there is not the faintest evidence that he in any

(1) 9 Ves. 292; 7 R. R. 195.

way advised him that it was a gift which there was not the slightest reason for him to make and that he had better not make it.

I will now make a few observations upon the decision of Wigram V.-C. in the case which has been cited to us of *Edwards* v. *Meyrick*. (1) Being a decision of that learned judge, it deserves great attention. It is suggested that he laid it down that this rule of Lord Eldon's had no application except in a case where the solicitor was employed in hac re. Now, that decision of Wigram V.-C. was dealt with afterwards by Turner L.J., and also by Lord Cranworth L.C., in the case of *Holman* v. *Loynes* (2), from which the true meaning of the decision of Wigram V.-C. may be arrived at. Turner L.J., speaking of that decision, after quoting the words of the Vice-Chancellor, says (3): "Gifts from clients to their attornies can be maintained only, when not only the relation has ceased but the influence may rationally be supposed to have ceased also." Now, in my view here Mr. Carter never did from first to last cease to be the solicitor of Colonel Wright. He was the solicitor advising him in all his affairs, and advising him in particular both in dealing with his property, including the rejected assets, in dealing with his most pressing creditor, if not his only creditor, the Capital and Counties Bank, in dealing with the settlements that he should make on his children, and in dealing with these very deeds by which gifts were to be made. Under those circumstances, to my mind it would be absolutely untrue to say that Mr. Carter did not continue solicitor in hac re; and certainly, if it could be held that the employment of the independent solicitor took that particular matter out of the hands of the regular solicitor, it could not possibly be said that the proper inference was that the influence of the regular solicitor might rationally be supposed to have ceased under those circumstances. In my judgment, so far as Mr. Carter is concerned, these deeds of May 15, 1900, can neither of them stand.

With regard to the position of the other beneficiaries under

(1) 2 Hare, 60. (2) 4 D. M. & G. 270.
(3) 4 D. M. & G. 283.

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the deeds, I regret to say that I cannot agree with the decision of Kekewich J. It seems to me that the gifts to the children and the gifts to the solicitor were wholly different. They might just as well, in my opinion, have been made by two separate deeds. The reason which seems to have operated chiefly to induce Colonel Wright to make these presents to his solicitor was not the reason why he was making a provision for his children; and it seems to me not to be true, in any sense of the word, to say that the two gifts to the solicitor and the settlement on the children, and also the provision for the wife, were really one and the same transaction induced by the same motives, or to say that the wife or the children in any sense claim through the solicitor. Under these circumstances it seems to me that these deeds, except in respect of Mr. Carter, must stand.

I will now pass to the deed of March 14, 1901. [His Lordship then stated the facts and examined the evidence leading up to the preparation and execution of that deed, including the calling in of Mr. Tarbet with a view to its preparation, and the communications and interviews that took place between himself, Mr. Carter, the plaintiff, Miss Wright, and Nevill Wright upon the subject, pointing out that it was quite plain that by this deed the plaintiff was parting with the whole of his property in the widest possible terms, although he was not being relieved from his liabilities to his wife and family. His Lordship held that this position was not fully explained to the plaintiff by Mr. Tarbet, who himself apparently did not understand, and had not the materials to enable him to understand, the plaintiff's real position. His Lordship proceeded :—]

If and so far as competent independent advice was necessary to support the transaction, Mr. Tarbet was manifestly not in a position to give it, for he knew really next to nothing about the plaintiff's affairs or of his financial condition. I say, "If and so far as competent independent advice was necessary," because I am not prepared to lay it down that, in every case of purchase, competent independent advice is necessary as distinguished from the advice of the purchasing solicitor. It may be that a particular transaction of purchase appears to be so

manifestly fair that independent advice is not necessary; but in this case there is no evidence to shew that this was a fair transaction. As far as I can draw inferences from the circumstances of this case, it seems to me highly probable that it was not a good bargain for Colonel Wright: at all events, whether it was so or not, we have not sufficient evidence that it was, and Mr. Tarbet had no materials which would enable him to form a judgment. Now, in my opinion, not only is this deed a deed which does not shew that the bargain was a fair one, but there is a good deal to shew that it was a bargain which no prudent person would for one moment have entertained; and under these circumstances we have to decide whether this deed ought to be set aside.

First, with regard to Mr. Carter, I have not the slightest doubt that this transaction cannot stand, and that it is a transaction under which he gets a new consideration beyond the old gift of two-twentieths, for he now gets one-third of the rejected assets, and, moreover, he and his co-covenantors do not take over the whole of the liabilities of the settlor, the whole of whose property was being taken, and who stood in the relation of client to Mr. Carter. With regard to the other two beneficiaries, Miss Wright and Mr. Nevill Wright, I am of opinion that they are, for this purpose, in the same position as Mr. Carter, and that this is not a case in which the consideration which is to come to them can be separated as in the case of the two deeds of 1900. Those were deeds of gift, whereas this is a case in which there is a bargain and a consideration; and, in my judgment, this is a bargain which was entered into in such circumstances that it is not binding on Colonel Wright; for it has not been shewn to be a fair and honest bargain, and, moreover, it was a bargain entered into at the time when Mr. Carter continued, notwithstanding the employment of Mr. Tarbet, to act as solicitor for Colonel Wright. In my judgment, Mr. Carter was acting throughout this matter in concert with Miss Wright and Mr. Nevill Wright. In these circumstances it would be against conscience for them to attempt to take advantage of a bargain obtained in this way.

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I know it was said that the rule in *Huguenin* v. *Baseley* (1) only applies where fraud has been proved, and that in this case we must take it that no fraud has been proved; but I do not agree with that argument at all. It is established here, to my mind, that this deed was executed by Colonel Wright under the influence of Mr. Carter, without fully understanding what was being done, and without competent independent advice. In my judgment, not only cannot Mr. Carter enforce that deed, but also it is, in my opinion, within the rule in *Huguenin* v. *Baseley* (1), against conscience that any of the parties to that bargain should be able to enforce their rights.

In those circumstances I think the deed of March 14, 1901, must be set aside as against all these defendants.

As to the agreement of July 13, 1901, which was supplemental to the second deed of May 15, 1900, it is, as in the case of that deed, void as against Carter only.

STIRLING L.J. I have arrived at the same conclusions, and, after the exhaustive manner in which the case has already been dealt with by my Lord, I do not think I need go very deeply into it; but I desire to state the grounds which have more particularly led me to the conclusion that the deeds of 1900 must be set aside as regards the defendant Mr. Carter, and that the deed of 1901 must be set aside as regards all the defendants.

Now, the two sets of deeds have been treated, and require to be treated, in different ways. The deeds of 1900 were deeds by which gifts were conferred on a solicitor by his client. In those deeds it is stated that the motive and consideration for them consisted of the various services rendered by Mr. Carter to Colonel Wright; and that being so, the transaction is brought within the very terms of the rule of the Court as stated by Lord Eldon in *Hatch* v. *Hatch*. (2) With reference to that case, I desire to say that I have always understood that Lord Eldon's judgment contained an accurate statement

(1) 14 Ves. 273; 9 R. R. 276; 1 W. & T. 7th ed. p. 247.
(2) 9 Ves. 292; 7 R. R. 195.

of the law of the Court as it stood at the time when that judgment was delivered, and that it continues to be an accurate statement of the law as it stands at the present time; and I think it is a clear authority for these two propositions: First, that transactions of gift between solicitor and client are watched and scrutinised by the Court with the utmost jealousy. This doctrine is one founded on important reasons of public policy; and the result is that, before such a transaction can be upheld, the Court must be satisfied that, as Lord Eldon puts it, "it is an act of rational consideration, an act of pure volition, uninfluenced." In other words, the Court, in dealing with such a transaction, starts with the presumption that undue influence exists on the part of the donee, and throws upon him the burden of satisfying the Court that the gift was uninfluenced by the position of the solicitor. Secondly, this presumption is not a presumption which is entirely irrebuttable, though it is one which is extremely difficult to be rebutted. Lord Eldon puts it that it was "almost impossible" to uphold such a gift in the case of the relationships which he specified, one of them being that of attorney and client. Now, it has been laid down in recent cases, and particularly in two cases in this Court—*Mitchell* v. *Homfray* (1) and *Liles* v. *Terry* (2)—that in order to uphold a gift of this kind the donor must have competent independent advice in conferring the gift. That is to say, the transaction cannot be upheld unless that condition is satisfied; but if the old rule still remains—that the Court must look to all the circumstances of the case—the introduction of a new solicitor, although a highly important element, does not conclude the matter, and the Court has still to be satisfied that the influence arising from the relationship can no longer be supposed to exist. I think also that the new solicitor called in to advise in such a case takes upon himself no light nor easy task. The duties of the adviser have been considered by Farwell J. in the recent case of *Powell* v. *Powell* (3), and in the course of his judgment he says this (4): "The solicitor does not discharge his duty

(1) 8 Q. B. D. 587.
(2) [1895] 2 Q. B. 679.
(3) [1900] 1 Ch. 243.
(4) Ibid. 247.

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by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists."

With that view of a solicitor's duty I agree. I think a solicitor would fail in his duty if he neglected to inform himself of the circumstances in which the transaction was taking place. It might turn out, for example, to be one in which a poor man was divesting himself of all his property in favour of the solicitor: in such a case it would be impossible, it seems to me, whatever the advice may have been, to uphold the transaction.

Having made these remarks as to the law applicable to such a case, I will make a few observations on the position with regard to the deeds of 1900. Without going into detail, I may point out what seem to me to be the striking features of the transaction. First of all, although a new solicitor was called in, yet he was not called in at the inception of the transaction. The terms of the gift had been defined and draft deeds prepared in the office—for that is the conclusion which must be come to on the evidence—of Mr. Carter before Mr. Almy's services came into operation. It is quite true that nothing to bind the plaintiff had been done, but still the advice which he received was not given until the transaction had made progress to a certain extent.

Secondly, the relationship of solicitor and client continued to exist between the plaintiff and the defendant Mr. Carter in regard to every other transaction except that of the settling and completing of the deeds which were proposed to be executed. Now, I have already pointed out that the motive and the consideration for the deeds appear, on the face of them, to be the services rendered by the solicitor to the client. Those services had been rendered with reference to very many and very important matters, but particularly with reference to the position of the client as regarded the Capital and Counties

Bank and the dealings which were taking place between them: and in relation to those matters the services of Mr. Carter, the solicitor, continued to be given.

Then, thirdly, with regard to the advice which was given to the plaintiff by Mr. Almy, the conclusion to which I come on the evidence is, that Mr. Almy took no steps to inform himself of the propriety of the gifts, or whether the plaintiff's circumstances were such as would justify a prudent man in his position in doing what he did, and that in fact he gave the plaintiff no real advice on the subject at all. What he did was merely to tell the plaintiff that if he intended to benefit Mr. Carter it was essential that he should be free from Mr. Carter's influence; and Mr. Almy says the plaintiff gave him to understand generally that he was entirely free from Mr. Carter's influence, and that all he desired to do was to give Mr. Carter a benefit in return for services rendered. Now, if that is all that is necessary to be done in order to establish a transaction of this kind, then, instead of such transactions being difficult and almost impossible to be upheld, there will in reality be found very little substantial difficulty in sustaining them. Speaking for myself, I can only say that I am not satisfied that the undue influence which must be attributed to Mr. Carter did not continue to be existing at the time these deeds were executed, and accordingly, in my opinion, these deeds ought to be set aside as against him.

Then arises the question whether, these deeds being bad as against Mr. Carter, the provisions in favour of the wife and children of the plaintiff are also vitiated thereby. Now, upon that point, I entirely agree with what has been said by my Lord. The case does not fall within the law as laid down by Lord Eldon in *Huguenin* v. *Baseley*. (1) It does not seem to me that the benefits which were conferred on the plaintiff's wife and children have in any way been derived from the undue influence of the solicitor. It is clear, I think, on the evidence that, quite apart from the intention to confer a benefit on Mr. Carter, the plaintiff intended to confer substantial benefits on his wife and family; and in those circumstances

(1) 14 Ves. 273; 9 R. R. 276; 1 W. & T. 7th ed. p. 247.

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it appears to me that they are entitled to retain the benefits conferred upon them by these deeds.

I now pass on to consider the deed of March 14, 1901. That cannot be treated as a transaction of gift pure and simple. It has been treated in argument as a transaction of sale, and I am prepared so to regard it. Now, here I am differing from the opinion of the learned judge who dealt with this case in the Court below; but, with the utmost respect, I confess I cannot agree with him in the view which he took that this was a good deed. Here, again, an onus, but of a different kind, is cast upon Mr. Carter. The rules of the Court require this to be proved in a transaction of sale in which the solicitor is a purchaser—first, the client must be fully informed; secondly, he must have competent independent advice; and, thirdly, the price which is given must be a fair one. The onus of proving all this lies on the solicitor. Now it seems to me, without dwelling on the two first requisites, that the third entirely fails. This is a sale of all the property, real and personal, of the plaintiff. It is described in general terms in the deed, and the deed was executed by the plaintiff without Mr. Tarbet, the solicitor who was advising him, being informed of what the property which was being included in the deed consisted, or of its value. No evidence has been adduced by Mr. Carter to shew of what the property consisted or what its value was. How, then, is it possible to say that a fair consideration was given for this property? I am not satisfied that any one of the three requisites to which I have referred is established as regards this deed; but I decide on the simple ground that as the defendant, Mr. Carter, has failed to prove that the fair value was given, the deed must be set aside as against him, as is laid down in *Holman* v. *Loynes*. (1)

Then comes this question: How does that result affect the two children of the testator, Mr. Nevill Wright and Miss Blanche Wright, who are the other persons who joined with Mr. Carter in executing this deed for an annuity which was secured only by their personal covenants? It seems to me that, if the transaction is bad as against Mr. Carter, they are so

(1) 4 D. M. & G. 270.

mixed up with it that it cannot be separated, and that the deed, as against them, must be set aside, on proper terms, no less than as against Mr. Carter—that it is one single transaction, and, as it fails against Mr. Carter, it fails also against them. For these reasons I think that the plaintiff is entitled to the relief he claims.

COZENS-HARDY L.J. I am of the same opinion; but I wish briefly to state my own views without attempting to recapitulate the facts, or to discuss again the authorities referred to by my learned brethren.

As to the deed of 1901, I think it cannot stand. I do not regard it as in any real sense a transaction of sale and purchase. The guiding object of the plaintiff was, not to obtain the best price for his property, but to obtain a means of defeating the bank. It is true that we cannot in this action decide whether the conveyance was for the purpose of defeating his creditors; but I think we are entitled, and indeed bound, to ask whether this was a real bargain between vendor and purchaser, or a mere device by which the so-called vendor divested himself of all his property, present and future, without reference to its value. Looking at the evidence, I think only one answer can be given to that question; but assuming that the transaction is to be treated as a sale by the plaintiff to his solicitor, Mr. Carter, and to Miss Blanche Wright and Mr. Nevill Wright, I am clearly of opinion that it rests upon Mr. Carter to justify the sale and to shew that "the transaction was perfectly fair, that the client knew what he was doing, and that a fair price was given." Those are the words of Kindersley V.-C. in *Tomson* v. *Judge* (1), and, so far as I am aware, that statement of the law is consistent with all the authorities. Now, Mr. Carter has utterly failed to discharge this onus: perhaps it is more correct to say he has not attempted to do so; but it is argued that he did all the law required when he saw that Mr. Tarbet, a respectable solicitor, was called in to advise the plaintiff. Mr. Tarbet is not now a party to the action, and I desire to avoid needlessly saying anything which may prejudice

(1) 3 Drew. 306, 313.

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him. I am, however, bound to ask, For what purpose was he called in to advise? Not to advise as to the sufficiency of the consideration, not to advise as to the propriety of the transaction, but only to do what was requisite to carry out the proposal which had been previously agreed upon. It seems to me that, as against Mr. Carter, the transaction of 1901 cannot stand, and it has scarcely been contended by Mr. Duke that, on that assumption, Miss Blanche Wright can hold her share. The consideration was the joint and several covenant of the three persons combined to pay an annuity, but Mr. Carter was really at law the most responsible person. The contract of purchase was one and indivisible, and the deed must be set aside as a whole.

I may add—though it is not necessary for our decision—that the circumstances attending the preparation and execution of this extraordinary deed are such that I doubt whether it could be supported even if no fiduciary relation had existed between the plaintiff and Mr. Carter.

With respect to the transaction of 1900, that was one of pure gift, without any contract of purchase. It was one of gift to Mr. Carter and to Miss Blanche Wright and to Mr. Nevill Wright. As to Mr. Carter, I agree with Kekewich J. that the transaction cannot stand, and that the circumstances preclude the possibility of competent independent advice having been given to the plaintiff. Assuming, as I do, that the presumption of undue influence in the case of a gift by a client to his solicitor during the continuance of the relationship is not irrebuttable, I hold that something beyond what was done here is essential in order to sustain such a gift. Mr. Almy had not the materials necessary to enable him to advise, and he seems, moreover, to have taken a somewhat incorrect view of his duties, for he says that he understood the relation of solicitor and client was being severed only so far as was possible, and that the relation continued as to other matters. I am inclined to think that the only competent independent advice that should be given to a man who says he has arranged to make a gift to his solicitor is to tell him not to do so. In my opinion, as against Mr. Carter, the deeds of 1900 and the supplemental

agreement of July 13, 1901, must be set aside, and a resulting trust declared of all benefits taken by him under those documents; but I see no sufficient reason for impeaching any of those documents as against the plaintiff's children. They do not claim through Mr. Carter, and on the evidence it is not shewn that the benefits they take were procured by Mr. Carter or were due to any influence exerted by him. Neither *Huguenin* v. *Baseley* (1) nor *Barron* v. *Willis* (2) touches this point. My view is that the gifts under those three instruments are severable, and that, as far as the children are concerned, there is neither evidence nor presumption of undue influence.

VAUGHAN WILLIAMS L.J. The minutes of judgment had better be settled by counsel and mentioned to us on a future day.

Nov. 17. The case now came before the Court upon the minutes of judgment.

Warrington, K.C., and *A. àB. Terrell*, submitted that the decision of the Court that the several instruments were void as against Carter involved, as a necessary consequence, his removal as trustee of the deeds of May 15, 1900, and of the agreement of July 13, 1901, all of which remained valid so far as the interests of the other beneficiaries were concerned. The circumstances of the case were such as to justify his removal. At all events, he ought to resign his position, on account of the friction that must necessarily ensue in carrying out the trust.

Warmington, K.C., and *Christopher James*, for the defendant Carter, said no case had been made for his removal, and he declined to retire.

Badcock, K.C., and *Marcy*, for the defendant Nevill Wright, said that if Carter retired their client was willing to retire also. In the circumstances of this litigation, the continuance of the present trustees would lead to endless friction. They were instructed that the plaintiff's wife and married daughter, the

(1) 14 Ves. 273; 9 R. R. 276; 1 W. & T. 7th ed. p. 247.

(2) [1899] 2 Ch. 578; [1900] 2 Ch. 121; [1902] A. C. 271.

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other beneficiaries, also desired the appointment of new trustees.

Hon. Frank Russell (*Duke, K.C.*, with him), for the defendant Blanche Wright, said she desired that Carter should remain a trustee. He could not be removed in the absence of the plaintiff's wife and daughter, who were equally beneficiaries. The removal of a trustee must be the subject of a distinct application made in the presence of all the beneficiaries. Moreover, the plaintiff had not by his pleadings asked for the removal of Carter as a trustee.

VAUGHAN WILLIAMS L.J. The question as to whether Mr. Carter should remain trustee even if he lost his beneficial interest was not before us. At present we have not all the beneficiaries here, and therefore we think we have no right to deal with that question now. The declaration as regards Mr. Carter must, therefore, be confined to his beneficial interest.

The minutes as approved by the Court were, so far as it is material to state them, in the following form:—

"Discharge the judgment in this action dated January 21, 1902, except so far as it dismissed the action as against the defendants Almy and Tarbet.

"Declare that, so far as relates to the beneficial interest of the defendant Carter, the indentures of May 15, 1900, and the agreement of July 13, 1901, are respectively void as against the plaintiff (1), and order and adjudge the same accordingly. Declare that the beneficial interest of the defendant Carter under or by virtue of any of the trusts or provisions by or in the said indentures of May 15, 1900, or either of them, declared and contained is now vested in the plaintiff . . . . Declare that the indenture of March 14, 1901, is wholly void as against the plaintiff and ought to be delivered up to be cancelled, and order and adjudge the same accordingly. Liberty to apply for the purpose of giving effect to this declaration."

Then followed certain inquiries rendered necessary in consequence of the foregoing declarations, including a direction that the defendant Carter should account for the 425*l.* admitted

(1) It was suggested to their Lordships that the declarations as to the invalidity of the deeds should follow the form of the declaration made in *Bainbrigge* v. *Browne*, 18 Ch. D. 188, as given in Seton on Decrees, 6th ed. p. 2335; but their Lordships considered that the better form was that adopted in the principal case.

by him to have been received since the judgment. The minutes proceeded :—

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"Declare that each of the parties to the appeal is to bear his costs of the action. Order the defendant Carter to pay to the plaintiff his costs of this appeal. Order the plaintiff to pay to the defendant Blanche Wright her costs of this appeal. No costs of the defendant Nevill Wright of this action or appeal, but such defendant is not to be hereby precluded from claiming payment of such costs out of the property of which he is such trustee as aforesaid . . . . Reserve all future costs. Adjourn further consideration. Liberty to apply."

Solicitors: *H. W. Chatterton; E. & J. Mote; Charles Russell & Co.; Tucker, Lake & Lyon, for H. Wing & Son, Nottingham.*

G. I. F. C.

In re VERRELL'S CONTRACT.

KEKEWICH J. 1902 Nov. 11.

[1902 V. 709.]

Vendor and Purchaser—Sale of Leaseholds by Executor—Lapse of Time—Actual Notice to Purchaser that no Debts of Testator remain Unpaid.

A testator by his will appointed his wife sole trustee and executrix thereof, and gave to her all his estate upon trust for sale or conversion for the benefit of herself during life or widowhood, and declared it to be his wish that, unless circumstances otherwise required it, his leasehold estates should not be converted during the life or widowhood of his wife, and at her death or marriage he bequeathed a leasehold house to his son. Eighteen years after the death of the testator the widow entered into a contract for sale of the leasehold house. Her solicitors informed the purchaser that there were no debts of the testator remaining unpaid. No reason for selling was suggested. The purchaser objected to the title, unless the concurrence of the son was obtained, but this was refused :—

Held, that, under the peculiar circumstances of the case, the purchaser having actual notice that there were no debts of the testator remaining unpaid, and no reason being suggested for the sale, the title was not one which ought to be forced on a purchaser.

ADJOURNED SUMMONS.

Ambrose Verrell by his will dated December 22, 1883, appointed his wife Ellen Mitchell Verrell sole executrix and trustee of his will, and gave all his estate and effects whether real or personal unto his said trustee in trust to convert the

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same into money by sale or otherwise, and to invest the proceeds thereof and retain the income for the benefit of herself during life or widowhood, and afterwards in trust for his children; and he declared it to be his wish that, unless circumstances otherwise required it, his leasehold estates should not be converted during the life of his wife or so long as she should remain his widow, but the income arising therefrom should, subject to all proper deductions, be paid to her as thereinbefore provided, and at her death or marriage he gave his leasehold house No. 20, Ferntower Road, Newington Green, to his son Edward George.

The testator died on April 10, 1884.

On September 1, 1902, Ellen M. Verrell entered into a contract with Thomas Frederick Maskell Stewart for the sale to him of the leasehold house No. 20, Ferntower Road for the sum of 450*l.*

In the course of the negotiations subsequent to the contract the vendor's solicitors gave to the solicitors of the purchaser actual notice that there were no debts of the testator remaining unpaid. In the investigation of the title the purchaser objected that under the will the vendor might have no power of sale unless circumstances required a sale, and inquired how this was to be proved; and also whether the testator's son Edward George was of age, and, if so, whether he would join in the assignment to cure the difficulty. The vendor's solicitors replied that the vendor was the executrix and trustee, and, referring to the terms of the will, said that the mere expression of the testator's wish that the leaseholds might not be sold during his wife's lifetime did not affect the power of sale now being exercised by the widow as executrix and trustee. They also stated that the testator's son was of age and resided abroad, and that the vendor would not ask him to join.

The purchaser further insisted on his objection, and the vendor's solicitors contended that the terms of the will vested the legal estate in her, and that she was able to effectually vest the property in the purchaser, either in one or both of the capacities in which she was named in the will.

This summons was taken out by the purchaser under the

Vendor and Purchaser Act, 1874, claiming that his objections and requisitions in respect of the title had not been sufficiently answered by the vendor, and that a good title had not been shewn in accordance with the contract for sale, and in particular that it might be declared that under the circumstances the vendor had not under the will power to sell the premises.

Reeve, for the purchaser, in support of the summons. The vendor must be selling either as trustee or executrix. No doubt the mere lapse of time would not prevent her from selling in the latter capacity. But here there is this peculiar circumstance that the purchaser has actual notice that there are no debts of the testator remaining unpaid. Nor is any other reason for the sale suggested. It is clear, therefore, that the vendor cannot be regarded, as against the purchaser, as selling in the capacity of executrix. Again, in view of the facts, and having regard to the terms of the proviso in the will, it is clear that she cannot sell in the capacity of trustee, nor at all without the concurrence of the son.

Woodfin, for the vendor. *In re Whistler* (1) is a clear authority that the rule in *In re Tanqueray-Willaume and Landau* (2) does not apply to the case of an executor selling leaseholds, and that, therefore, the lapse of time does not affect the power of this executrix to sell. That case has been followed by Stirling J. in *In re Venn and Furze's Contract*. (3) It is true that here there was actual notice to the purchaser that there were no debts, but there might have been other expenses of administration, to meet which the sale was made. In the cases cited it was pointed out that the power of an executor to sell is not limited to the purpose of payment of debts. Then, on the construction of the will, the vendor has full power to sell as trustee. The proviso in the will prohibits a sale "unless circumstances otherwise require," and it is for the trustee, and the trustee only, to determine what those circumstances are.

(1) (1887) 35 Ch. D. 561. (2) (1882) 20 Ch. D. 465.
(3) [1894] 2 Ch. 101.

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KEKEWICH J., after referring to the facts of the case, continued as follows:—The effect of the proviso is that the widow is to have the enjoyment of the leaseholds in specie—in other words, that the trust for sale should be treated as mere machinery. Then in the event of the widow marrying again this particular property, the subject of the present application, is given to the son Edward George. That is a specific gift to him. It is quite obvious that there is no absolute trust for sale. What the circumstances could be which would require the sale it is not easy to guess. At any rate they are not shewn to have occurred, and the specific devisee could interfere to prevent the selling of this property, which is his, and ought to come to him. Therefore, as trustee, it is clear that the vendor can make no title. But she is also executrix, and possibly she may make a title in that way. The will was dated in 1883 and the testator died in 1884. That is immaterial, because even if it were twenty years there would be nothing to prevent the vendor making a title as executrix, it having been laid down in *In re Whistler* (1) by Kay J., whose decision has been sanctioned by Stirling J. in *In re Venn and Furze's Contract* (2), that the rule as to freehold estates does not apply to an executor selling leaseholds. Therefore the mere expiration of a certain period of time will not affect the power of the vendor as executrix. Stirling J. was at first not disposed to follow *In re Whistler* (1) because he did not see any general rule laid down, and there are words in the judgment of Kay J. which justify that. But all the authorities on either side were cited to Stirling J. by counsel well versed in this branch of the law. He there had *In re Whistler* (1) before him, and he followed it, and treated it as general law. That being so, the lapse of time is immaterial; but I have here a very peculiar fact which requires some consideration. The vendor's solicitors, whom I must treat as representing the vendor, have stated pointedly that there were no debts, and that the vendor was not selling for the purpose of paying debts of the testator. That is a fact which did not exist in the two cases referred to. But an executor's power of selling leasehold

(1) 35 Ch. D. 561. (2) [1894] 2 Ch. 101.

property is not confined to the purpose of paying debts, but extends to a sale for other purposes, and that was pointed out by Kay J. in *In re Whistler*. (1) He says: "The suggestion is made, with which I entirely agree, that it is not merely the debts of the testator which the executor has to pay; he may have incurred expenses of administration and he may have to raise money by pledge or mortgage of the personal property of the testator, and these are matters for which it is essential that he should retain the power of dealing with the assets of the testator." That passage is quoted by Stirling J. in his judgment in *In re Venn and Furze's Contract* (2), and he makes, so far as I can see, no remark upon it; but on page 112 he says: "I think, therefore, that I am bound to hold, in accordance with what is laid down in *In re Whistler* (1), that the rule laid down in *In re Tanqueray-Willaume and Landau* (3) does not apply to the present case, one reason being that the duties of an executor in connection with his testator's personal estate are not confined to payment of debts. This being so, it seems to me that the sale which took place in 1878 may well have been made in discharge of the duties of Taylor as executor." Turning to the present case, we now know that this is not a sale for the payment of debts, though it may have been made for the purpose of paying some expenses of executorship. But nobody suggests that there is anything of that kind, and I have this peculiar case to deal with. A long time has elapsed during which there is not the slightest evidence of the executrix having anything to do in the character of executrix. It is admitted that there are no debts, and it is not suggested that there is any other reason for selling. I do not feel myself bound to hold that even an executrix can, in a peculiar case like this, make a sufficient title. I must not say that where there are no debts the possibility of selling for other purposes cannot be regarded as sufficient; it is enough for me to say that I do not think I ought to force a title on a purchaser where there is no definite law on the point. Stirling J. in *In re Venn and Furze's Contract* (2) refers to a

(1) 35 Ch. D. 561, 566. (2) [1894] 2 Ch. 101.
(3) 20 Ch. D. 465.

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case of *In re Molyneux and White* (1), a decision of the Court of Appeal in Ireland, where a different view of the law was taken. It was a decision not binding on him, and it is not binding on me, and I only refer to it for the purpose of shewing that, although it was cited to Stirling J., he took the same view as Kay J., and that must be considered to be settled law. But it is not right to go beyond what is there laid down, and it seems to me that in this case there is good ground for my saying that the title ought not to be forced on the purchaser. I hold, therefore, that the purchaser's requisition has, under the circumstances, not been sufficiently answered.

Solicitors: *Hoddinott & Davis; H. Mear.*

C. C. M. D.

BYRNE J.
1902
Nov. 4.

In re HIRAM MAXIM LAMP COMPANY.

[00205 of 1902.]

Company—Winding-up—Contributory—Call—Set-off—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 101.

Where a set-off is claimed or pleaded in defence to an action for a debt, the debt sued on is not thereby extinguished to the extent of the debt sought to be set off, but two separate and distinct debts remain until judgment.

When, therefore, a company, while a going concern, sues a shareholder for a call, and he sets up a defence of set-off, and before judgment is obtained a winding-up of the company commences, the defence of set-off in the action does not prevent the application of the ordinary rule that the debt owing by the company to the shareholder cannot be set off in proceedings in the winding-up to obtain payment of the call.

THE Hiram Maxim Lamp Company, Limited (below called "the lamp company"), was registered on May 31, 1901, one of its objects being to adopt and take over an agreement with the Sir Hiram Maxim Electrical and Engineering Company, Limited (below called "the electrical company"), one of the terms of which was that the electrical company should supply

(1) (1884) 13 L. R. Ir. 382; 15 L. R. Ir. 383.

the lamp company with certain lamps at fixed rates. This agreement was adopted by the lamp company. The electrical company acquired 5000 shares of 1*l.* each in the lamp company on each of which the sum of 10*s.* was credited as paid up.

On January 10, 1902, the lamp company made a call of 5*s.* per share on the 5000 shares, which was payable on February 6. The call not having been paid, the lamp company on March 10 commenced an action against the electrical company to recover 1250*l.*, the amount of the call, and interest, and issued a summons for judgment under the Rules of Supreme Court, 1883, Order XIV. The electrical company by its evidence in opposition claimed that a sum of 1136*l.* 4*s.* was due to it from the lamp company for lamps supplied, and on July 4 an order was made in the action giving the electrical company unconditional leave to defend on paying into court 124*l.* 15*s.* 2*d.*, the difference between the amount sued for and the 1136*l.* 4*s.* The 124*l.* 15*s.* 2*d.* was paid into court on July 8, and the electrical company subsequently delivered a defence pleading a set-off as to the balance of the amount claimed by the lamp company.

On July 9, before the action could be tried, the lamp company passed an extraordinary resolution for voluntary winding-up and appointing a liquidator, and on July 19 the liquidator settled the electrical company on the list of contributories. On July 22 the liquidator took out an originating summons in the winding-up against the electrical company for a balance order, directing it to pay the call of 1250*l.* to the liquidator.

The summons was adjourned into Court.

Rowden, K.C., and *Stutfield*, for the liquidator. The electrical company will contend that what took place before the winding-up commenced entitles that company to set off the debt alleged to be due to it against the amount of the call.

Section 101 of the Companies Act, 1862, provides that after a compulsory order the Court may order a contributory to pay any money due from him to the company, exclusive of calls, and that "when the company is not limited" it may

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allow the contributory by way of set-off any moneys due to him from the company on an independent contract; and that when all the creditors of any company are paid in full, moneys due on any account from the company may be allowed by way of set-off against subsequent calls. In the case of a limited company, whether the liquidation be voluntary, under supervision, or compulsory, and whether the call was made before or after winding-up, there can be no set-off of a debt to a contributory against a call made on his shares: Buckley on Companies, 8th ed. p. 329; *Black & Co.'s Case* (1); *In re Whitehouse & Co.* (2); *Grissell's Case.* (3) New rights attach on the winding-up of a company, and every present member of it is then liable to contribute to its assets for payment of its debts and liabilities, the costs, charges, and expenses of the winding-up, and the payment of the sums required to adjust the rights of contributories among themselves: Companies Act, 1862, s. 38. It is clear that a debt cannot be set off after winding-up against a call made before winding-up: *Barnett's Case.* (4) And the fact that in an action for calls commenced but not decided before winding-up the defendant shareholders have set up or pleaded a defence of set-off does not affect the question.

H. Terrell, K.C., and *Hansell*, for the electrical company. We admit that if a call quâ call has been made before winding-up, then on winding-up commencing there is no set-off in respect of a debt due to the contributory. But if the call has been satisfied by payment or set-off before winding-up, there is no debt due to the liquidator or the company in respect of the call.

Under the statutes as to set-off, 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, mutuality of debts gave the right of set-off; and a set-off to an amount equal to the plaintiff's claim is a defence to the action: Roscoe's Nisi Prius, 17th ed. p. 697.

In *In re Whitehouse & Co.* (2) no right of set-off was claimed or pleaded before the winding-up; but here the shareholder company had previously set up its claim to set off; and as soon

(1) (1872) L. R. 8 Ch. 254.
(2) (1878) 9 Ch. D. 595.
(3) (1866) L. R. 1 Ch. 528.
(4) (1875) L. R. 19 Eq. 449.

as it did so and paid the balance into court there remained no debt due to the lamp company in respect of the calls.

The evidence in answer to the application in the action for judgment under Order XIV., setting up the claim to a set-off, put the defendant company in a position to rely on that claim notwithstanding the winding-up commenced before judgment in the action: *Whiteley's Case.* (1) The absence of judgment is immaterial, because the judgment would only relate back and declare judicially what was the state of facts previously existing between the parties. The debt on the call was extinguished when the set-off was claimed.

[They also referred to Bullen and Leake on Pleading, 3rd ed. p. 682.

BYRNE J. referred to the form of plea of set-off in the Common Law Procedure Act, 1852, Sched. B, 41.]

Rowden, K.C., in reply. The debt in respect of the call was not extinguished by the claim to a set-off. The two debts would remain distinct debts until judgment, and there never was a judgment. After winding-up the rights of creditors intervened, and the hand to receive the call was different.

[He referred to *In re Auriferous Properties, Limited* (2), and Annual Practice, 1903, vol. i. p. 275.]

BYRNE J. This is an application by the liquidator in the voluntary winding-up of a company for an order for payment of a call. The call was made while the company was a going concern, and, before the commencement of the winding-up, an action was brought by the company to recover the amount of the call. On an application by the plaintiff company for judgment under Order XIV., it was ordered that on payment into court by the defendant company, the shareholder, of the difference between the amount claimed in respect of the call with interest and the amount which the defendant company claimed to set off, the defendant company should have unconditional leave to defend. The difference was duly paid into court, and a defence of set-off was set up by the defendant company.

(1) [1900] 1 Ch. 365. (2) [1898] 1 Ch. 691.

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Before any judgment could be given in the action the plaintiff company went into voluntary liquidation, and the applicant in the case now before me was appointed liquidator. New rights thereupon intervened, and the applicant now comes in his capacity as liquidator to obtain what the company sued for but did not recover before the commencement of the winding-up.

It is conceded on behalf of the shareholder company that, if no action had been brought, and there had been no plea of set-off, it could not have been contended, in the face of the authorities, that the shareholder company had any right of set-off against the liquidator's claim: see *Grissell's Case* (1) and *Black & Co.'s Case*. (2)

But it has been contended that, inasmuch as before the commencement of the winding-up the defence of set-off was asserted, the right of set-off can be insisted on in the winding-up, and that in point of fact, subject to the proof of the cross-debt owing to the shareholder company, the original debt in respect of the call is gone. I cannot accept this view.

In truth, the plea of set-off is a plea proper, and is the setting up of the existence of a debt which by statute or by rules under a statute a defendant is entitled to set off against a sum due by him to the plaintiff. There remain until judgment two distinct and separate debts (3), and, in a case where there never has been a judgment, I see no reason why the ordinary rule should not prevail, or why the liquidator should not recover the amount of the call without any deduc-

(1) L. R. 1 Ch. 528.

(2) L. R. 8 Ch. 254.

(3) In *Mead* v. *Bashford*, (1850) 5 Ex. 336, 340, 341, Alderson B., delivering the judgment of the Court, said: "The gist of the plea of set-off is, that the plaintiff is indebted to the defendant in a sum equal at least to that which he is seeking to recover in his action .... What the defendant undertook to prove was, that his cross-demand in its integrity equalled the plaintiff's whole claim when proved."

And in *Briscoe* v. *Hill*, (1842) 10 M. & W. 735, 738, Parke B. during the argument said: "The meaning of a plea of set-off is, that the plaintiff was and still is indebted to the defendant in a larger amount than his demand against the defendant, and in order to make that defence available, it should be equally true at the time of the trial as at the time of pleading."

tion in respect of what has been sued for but not recovered before the commencement of the winding-up.

The order asked for by the liquidator must be made; but he must undertake to discontinue the action, and to consent to the amount paid into court being returned.

Solicitors for liquidator: *Angove, Bromwich & Yeo.*

Solicitors for electrical company: *George Terrell, Terrell & Varley.*

F. E.

In re SPENCER'S SETTLED ESTATES.

[1902 S. 2076.]

Settled Land—Compound Settlement—Trustees of Compound Settlement—Power of Appointing—Appointment of Trustees—Solicitor of Tenant for Life—Existing Trustees—Affidavit of Fitness—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 8; *s.* 38.

In 1863 estates were settled upon A. for life, with remainder, subject to a jointure and portions for younger children, to A.'s first and other sons in tail. In 1898 B., the eldest son of A., joined with his father in barring the entail and resettling the estates upon A. for life, with remainder to B. for life, with remainders over. The resettlement contained a declaration that the trustees of that deed should also be the trustees for the purposes of the Settled Land Acts of the compound settlement created by the settlement of 1863 and the resettlement of 1898. A. died in 1901. The jointure and portions charge were still subsisting. B. was desirous of selling part of the estates under his statutory power free from the jointure and portions charge, and now applied that the trustees of the resettlement might be appointed trustees of the compound settlement if the Court should be of opinion that they were not already properly appointed. One of these three trustees was the solicitor of the tenant for life, and also a trustee of the settlement of 1863:—

Held, that the declaration in the resettlement of 1898 did not amount to a declaration by "the settlement," as defined by s. 2, sub-s. 1, of the persons to be trustees thereof for the purposes of the Settled Land Acts within the meaning of s. 2, sub-s. 8, and consequently that there was no valid appointment of trustees of the compound settlement, who in this case could only be appointed by the Court:

Held, also, that the fact that the solicitor of the tenant for life was already a trustee of the settlement of 1863 and of the resettlement of 1898, and the alleged convenience to the parties of having the same trustees for all the settlements, was not sufficient to take the case out of

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the general rule laid down in *In re Kemp's Settled Estates*, (1883) 24 Ch. D. 485, and *In re Earl of Stamford*, [1896] 1 Ch. 288, and the two remaining trustees only were therefore appointed trustees of the compound settlement upon production of affidavits of their fitness in the usual way.

ADJOURNED SUMMONS.

This was an application by a tenant for life for the appointment of trustees of a compound settlement which raised the question whether, on a resettlement of the estates by a father and son in the usual way, the settlors can, by the resettlement, appoint trustees of the compound settlement constituted by the original settlement, the disentailing deed, and the resettlement, or whether these trustees must be appointed by the Court. A further question was also raised respecting the appointment by the Court, in cases of this kind, of the solicitor of the tenant for life as one of the proposed trustees. The deeds under which the questions were raised, so far as material, and the facts were as follows:—

By a settlement of December 23, 1863, made on the marriage of Harry Hammond Spencer with Miss Annie Frances Kelson, freehold estates in the counties of Middlesex and Surrey were limited to the use of Harry Hammond Spencer for life, and after his decease to the use that Annie Frances Kelson should receive 500*l.* per annum by way of jointure, and subject thereto to the use of the trustees, who were two in number, for 1000 years, in trust to raise 5000*l.* for portions for younger children, and subject thereto to the use of the first and other sons of the said Harry Hammond Spencer successively, according to seniority, in tail male, with divers remainders over. The trustees of this settlement had a power of sale and exchange at the request of the tenant for life.

By a deed of July 15, 1864, one Herbert G. H. Spencer was appointed trustee of the said settlement in the place of one of the original trustees; and by a deed of April 17, 1898, Vincent Biscoe Tritton and James S. Hepburn, a solicitor, were appointed trustees of the said settlement in the place of the other original trustee.

By a disentailing deed of April 19, 1898, the estate tail created by the said settlement of 1863 was duly barred by

Harry Adrian Hammond Spencer, the eldest son of the said marriage of Harry Hammond Spencer and Annie Frances, his wife.

By a settlement of April 19, 1898, made on the marriage of Harry Adrian Hammond Spencer, to which Harry Hammond Spencer, Harry Adrian Hammond Spencer, the intended wife, and the said Herbert G. H. Spencer, Vincent Biscoe Tritton, and James S. Hepburn (therein called "the trustees") were the only parties, the said estates were limited to the use of the said Harry Hammond Spencer for life in restoration and by way of confirmation of his prior life estate, with remainder to Harry Adrian Hammond Spencer for life, with divers remainders over in strict settlement. This deed contained a declaration that "the trustees shall be the trustees or trustee under the settlement made by these presents, and also under the compound settlement made by the hereinbefore recited indentures" (i.e., the settlement of 1863 and the disentailing deed of 1898), "and these presents, if such there be, for all the purposes of the Settled Land Act, 1882, and the Acts amending the same."

In January, 1901, Harry Hammond Spencer died, and thereupon the limitation of 500*l.* per annum for the jointure of his widow, Mrs. Annie Frances Hammond Spencer, came into operation, and on her death the trusts of the term of 1000 years for raising 5000*l.* for portions for younger children would come into force. The widow was still alive. Harry Adrian Hammond Spencer, the present tenant for life, was desirous of selling portions of the settled estates under the statutory power of sale free from the jointure and portions term; but as some doubt had been thrown on the validity of the appointment of the present trustees as trustees of the compound settlement, the tenant for life took out a summons under the Settled Land Acts, 1882 to 1890, asking that the present trustees (naming them) or some other fit and proper persons might be appointed trustees for the purposes of the above-mentioned Acts of the compound settlement effected by the above-mentioned indentures, if the Court should be of opinion that the said trustees were not "already trustees of such compound settlement."

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L. F. Potts, for the summons. By s. 2, sub-s. 1, of the Settled Land Act, 1882, any number of deeds may constitute a "settlement"; by s. 2, sub-s. 8, the trustees are defined as the persons who are by "the settlement" declared to be trustees thereof. In this case "the settlement" is the compound settlement created by the settlement of 1863, the disentailing deed, and the resettlement of 1898; the declaration purporting to appoint trustees of the compound settlement is contained in one only of the three instruments constituting the compound settlement, and is not a declaration by "the settlement" within the meaning of these sub-sections. A settlor has no power in a resettlement of this kind to appoint trustees of the compound settlement; they can only be appointed by the Court. There being no trustees of the compound settlement, the Court has jurisdiction to appoint them under s. 38 of the Settled Land Act, 1882. There is nothing inconsistent in the coexistence of a settlement and a compound settlement: *In re Mundy and Roper's Contract.* (1) In Key and Elphinstone's Precedents, 7th ed. vol. ii. p. 653, two forms for the appointment of trustees of compound settlements are given—one for insertion in the original settlement, and the other for insertion in any subsequent settlement; but no authority is cited in support of this suggestion. The tenant for life is anxious that the Court should appoint the present trustees of the resettlement to be the trustees of the compound settlement. The solicitor of the tenant for life is already a trustee of the settlement of 1863 and of the resettlement of 1898, and it will be a great convenience to the parties to have the same trustees of all the settlements. The special circumstances of this case are sufficient to take this application out of the rule referred to by Stirling J. in *In re Earl of Stamford.* (2) The Court has jurisdiction to make this appointment, and I submit this is a proper case for the exercise of this jurisdiction.

J. G. Wood, for the trustees. The trustees of the settlement of 1863 and of the resettlement of 1898 are the same in this case. The appointment, contained in the last of the three instruments constituting this compound settlement, of the

(1) [1899] 1 Ch. 275. (2) [1896] 1 Ch. 288.

present trustees to be trustees of the compound settlement is a valid appointment, and they are the persons by the settlement declared to be the trustees thereof within the meaning of s. 2, sub-s. 8. The Act enables the settlor to appoint trustees of the settlement for the purposes of the Settled Land Acts; the declaration contained in the deed of 1898 satisfies the wording, and certainly the intention, of s. 2, sub-s. 8. The learned authors of the latest book of precedents seem to be of opinion that the appointment can be made by the settlors in a case of this kind. In this case the parties have themselves made a valid appointment of trustees of the compound settlement as well as of the resettlement, and the Court has, therefore, no jurisdiction to appoint trustees.

[*In re Marquis of Ailesbury and Lord Iveagh* (1) was referred to as shewing the extent of the power of sale where there were properly appointed trustees of a compound settlement.]

If the Court should be of opinion that the appointment is invalid, then it would be a great convenience to all the parties to have the same trustees for all three settlements.

Potts, in reply.

Cur. adv. vult.

Nov. 6. BYRNE J. In this case there is a settlement created by and consisting of three documents, the first being a settlement of 1863, which in time was followed by a disentailing deed, and a resettlement of 1898. The Settled Land Act, 1882, s. 2, sub-s. 1, provides, amongst other things, that any "instrument or any number of instruments, whether made or passed before or after . . . . the commencement of this Act, under or by virtue of which instrument or instruments any land, ... stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires." The use of the words "creates or is" rather points, I think, to the word "settlement" as including what is effected by the documents, but it also clearly means the documents making the settlement. In the

(1) [1893] 2 Ch. 345.

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events which have happened in this case there still remains the limitation of a jointure and a portions charge, secured by a term of years created under the original settlement, which are paramount to the resettlement. In the last of these deeds, the resettlement, the parties to it have purported to appoint trustees for the purposes of the compound settlement to be created by the three documents in question, and the application now made to me is to appoint trustees of what is conveniently called (though the expression is not used in the Act) the "compound settlement"; and what the parties desire first is to know whether these trustees have been validly appointed, because the Court has no jurisdiction to appoint new trustees if there already are trustees of this compound settlement duly appointed. The Settled Land Act, 1882, s. 2, sub-s. 8, in defining the trustees of the settlement, provides that (amongst others) "the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement." Sect. 38 provides for the appointment of trustees by the Court if there are no trustees, or in any other case if expedient so to do. It is argued that, inasmuch as the three deeds together constitute one settlement within the meaning of the Act, that the appointment by the last of those deeds of the respondents as trustees of the compound settlement to arise by virtue of the three deeds together is a good appointment of these trustees, who are, it is said, "by the settlement declared to be trustees thereof for purposes of this Act," following the words of s. 2, sub-s. 8. In this case I do not think that they are validly appointed trustees. I want to guard myself by saying that I am dealing only with the facts of this case, and that I am not attempting to lay down a general definition which should apply to all cases. I am not going to say that the appointment of trustees for the purpose of the compound settlement in one, or two, or three, or four documents may not under some circumstances be an effectual appointment; but in the present case I have only the appointment contained in the last of the documents forming the settlement, to which document some of the beneficiaries interested under the settlement are not parties,

nor are they bound by its provisions, and it appears to me, under those circumstances, that I should be wrong in saying that the declaration contained in the resettlement of 1898 amounts to a declaration by "the settlement" of the persons who are to be "trustees thereof for purposes of this Act" within the meaning of s. 2, sub-s. 8. I express no opinion about the precedents to which I have been referred as they do not appear to have been followed in the present case, in which it is sufficient to say that I am of opinion there has not been a valid appointment of the respondents as trustees of this compound settlement. I therefore have jurisdiction to make an appointment of trustees, and am willing to do so.

The remaining question raised before me was whether it was proper to appoint as one of these trustees the solicitor of the tenant for life, and on that point my attention was called to the case of *In re Earl of Stamford* (1), the result of which is that the Court has undoubted jurisdiction, if it thinks it a proper case, to appoint the solicitor of the tenant for life; but it is not the course of the Court to make an appointment of this kind, although Stirling J. did it in one case, and no doubt it would be done again in other cases if strong reasons were shewn that that would be more beneficial than another appointment. I have considered the question, and I do not see sufficient advantages to be derived from the appointment in this case to induce me to depart from the ordinary rule, which Stirling J. refers to as follows (2): "The rule is laid down by the Court of Appeal in *In re Kemp's Settled Estates* (3), a case which arose upon an application for the appointment of trustees for the purpose of the Settled Land Act, 1882, under s. 38 of that Act. Cotton L.J. said this (4): 'The gentleman is no doubt a fit person to be a trustee, and the only objection to him is that he acts as solicitor for the tenant for life. Now the appointment of trustees is required to impose a check upon the extensive powers conferred by the Act upon the tenant for life, and the 44th section contemplates the probability of there being differences between the trustees and the tenant for life.

(1) [1896] 1 Ch. 288.
(2) Ibid. 298.
(3) 24 Ch. D. 485.
(4) Ibid. 487.

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I have no doubt that Mr. Wood, as solicitor of the tenant for life, would advise him to the best of his ability, and recommend him to exercise his powers with a proper regard to the interests of the remaindermen. But solicitors, like judges, are fallible, and how could Mr. Wood, as one of the trustees, exercise a proper judgment on their behalf upon questions on which he had advised the tenant for life? It would be Mr. Wood as trustee putting a check upon Mr. Wood as solicitor to the tenant for life, and he would be placed in a false position.' Now that case lays down a rule of practice for the guidance of the Court, and it would not be right for me to depart from it." In certain cases, as he himself had done in the case of *In re Marquis of Ailesbury and Lord Iveagh* (1), the Court has and may depart from it, but he says most emphatically, "the Court ought to be very slow to depart from it—that before it departs from it the Court ought to see, not only that no disadvantage is likely to occur from the appointment, but that advantages are to be gained by reason of the appointment." I think I ought to follow the rule laid down, and must therefore decline to appoint the solicitor of the tenant for life one of the trustees; I will appoint the other two gentlemen trustees of this compound settlement upon production of affidavits of their fitness in the usual way.

Solicitors: *Hepburn, Son & Cutcliffe.*

(1) [1893] 2 Ch. 345, 360.

W. C. D.

BYRNE J.
1902
Nov. 6.

In re PYNE.
LILLEY *v.* ATTORNEY-GENERAL.

[1899 P. 2686.]

Charity—Practice—General Charitable Intention—Indefinite Objects—Disposition of Funds—Scheme or Sign Manual.

Where property is bequeathed to executors or trustees for charitable purposes, and the objects are not specified or indefinite, the proper mode of carrying out the general charitable intention of the testator is by a scheme under the Court; but where there is a general charitable intention without any trust interposed, the disposition of the gift is in the King by Sign Manual.

Moggridge v. *Thackwell*, (1803) 7 Ves. 36; 6 R. R. 76, and *Paice* v. *Archbishop of Canterbury*, (1807) 14 Ves. 364, applied.

Adjourned Summons.

The only question raised by this application was whether the general charitable intention referred to in the will of the above-named Sarah Ellen Pyne ought to be carried out by means of a scheme under the Court, or by the King by warrant under the Sign Manual.

By her will of September, 1897, the testatrix, after appointing the plaintiffs her executors and trustees and making several specific devises and bequests, gave the residue of her freehold, leasehold, and personal estate to her trustees, upon trust for sale and conversion in the usual way, and directed that after payment of debts, funeral and testamentary expenses, and legacies her trustees were to stand possessed of "the residue or surplus thereof, in trust for such charitable purposes and in such shares and proportions as may be hereafter set forth in any codicil or codicils to this my will."

The testatrix died in May, 1899, without ever having executed any codicil. The will was duly proved in June, 1899.

By an order of April 10, 1900, made on an originating summons taken out by the trustees, the plaintiffs, for the determination of various questions arising under the said will, the Court made a declaration that "the ultimate residue of the estate of the testatrix is effectually bequeathed for charitable

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purposes"; and an inquiry was directed of what this residue consisted.

The master having certified the result of this inquiry, the plaintiffs now applied by summons for a scheme for the establishment, regulation, and management of a charity to carry out the charitable purposes mentioned or referred to in the will of the testatrix concerning her residuary estate.

Methold, for the plaintiffs. The more usual practice in cases of this kind is to direct a scheme. Here there are trustees, but no objects of the charity are mentioned, though the Court has held that there is general charitable intention; in that state of circumstances Lord Eldon decided that a scheme was the proper course to adopt: *Moggridge* v. *Thackwell* (1); *Paice* v. *Archbishop of Canterbury*. (2) In *In re White* (3), where the societies to be benefited were not specified, a gift very similar to the bequest in this case, the Court held that the estate was subject to a trust for charitable purposes and directed a scheme.

[BYRNE J. referred to *In re Davis*. (4)]

A scheme by the Court is, therefore, the proper mode of carrying out the charitable intentions of this testatrix.

R. J. Parker, for the Attorney-General. Prior to *Moggridge* v. *Thackwell* (1), the authorities were very conflicting: since that decision, and the case of *Paice* v. *Archbishop of Canterbury* (2), there does not seem to have been any reported case on the subject. The dictum of Lord Eldon in *Moggridge* v. *Thackwell* (1) is not absolutely clear; he seems to contemplate the case of an indefinite charitable purpose, without the person to carry out the trust being named; he omits the case of trustees to carry out the general charitable trust being named, without anything more as to the objects of the trust. It is desirable to have a decision as to the respective rights of the Crown to direct the disposition of a charitable gift under the Sign Manual, and of the Court to direct a scheme.

(1) 7 Ves. 36; 6 R. R. 76.
(2) 14 Ves. 364.
(3) [1893] 2 Ch. 41.
(4) [1902] 1 Ch. 876.

BYRNE J., after stating the question raised for decision, the words of the gift, and the decision of April 10, 1900, continued:—The leading case on the subject is *Moggridge* v. *Thackwell.* (1) There a testatrix gave "all the rest and residue of my personal estate unto James Vaston, of Clapton, Middlesex, gentleman, his executors and administrators; desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters; and I appoint the said John Moggridge and Mr. Vaston before mentioned, executors of this my will; and I desire Robert Woodford, of Taplow, Bucks., Esquire, and the aforesaid Mr. Richard Wicherley, to aid and assist my executors." A decree was made by Lord Thurlow that the residue of the testatrix's personal estate passed by her will, and ought to go and be applied in charity, regard being had to clergymen with good characters and large families, according to the recommendation in the will; and that the master should approve of a scheme to effectuate the purposes of the said charity, with liberty for the parties to lay proposals before him for that purpose. The case was brought before Lord Rosslyn for directions on the master's report, and ultimately came on for rehearing before Lord Eldon, who considered the question by what means the general charitable intention was to be carried into effect. After referring to cases on the question of the construction of the will, Lord Eldon says (2): "Those cases call upon me to say, the general intention of this testatrix, who seems to have been saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects, was to devote her property to charity, and according to these precedents Vaston was only the means and instrument, by which that general intention was to be executed; and therefore this Court will carry that general intention into effect." He goes on: "The next question, by what means that is to be done, is a most difficult question; for it being established, that, where money is given to charity generally and indefinitely, without trustees or objects selected, the King, as parens patriæ,

(1) 7 Ves. 36; 6 R. R. 76.

(2) 7 Ves. 83, 86.

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is the constitutional trustee, it is very difficult to raise a solid distinction between an original gift absolutely indefinite and without qualification, and a case, in which by matter ex post facto, the gift stands before the Court in consequence of that accident, as if it had been originally given indefinitely, without any means for carrying it into execution prescribed. All I can say upon it is, I do not know, what doctrine could be laid down, that would not be met by some authority upon this point; whether the proposition is, that the Crown is to dispose of it, or the master by a scheme." Then, after referring to authorities, he concludes: "Therefore I rather think, the decree is right. I have conversed with many persons upon it. I have great difficulty in my own mind; and have found great difficulty in the mind of every person I have consulted: but the general principle thought most reconcileable to the cases is, that, where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition is in the King by Sign Manual: but where the execution is to be by a trustee with general or some objects pointed out, there the Court will take the administration of the trust." In *Paice* v. *Archbishop of Canterbury* (1) executors were appointed, and the gift was: "All the remainders of my different bequests I give and bequeath to the Archbishop of Canterbury and to the Archbishop of York for the time being in trust for charitable purposes and any thing not specified I commit to the discretion of my executors." That is, to my mind, very similar to the gift in the present case, for I read it as equivalent to a gift for general charitable purposes. In giving judgment the Lord Chancellor—Lord Eldon—says: "Therefore, after the donation, to be made by the executors to the poor, the extent of which is almost unlimited, the general residue is to go to charitable purposes; and must be the subject of a scheme before the master. Where the bequest is to trustees for charitable purposes, the disposition must be in that mode; but, where the object is charity, without a trust interposed, it must be by Sign Manual. That is the distinction, which I adopted in the case of *Moggridge* v. *Thackwell*." (2) Lord Eldon thus explains

(1) 14 Ves. 364, 371.

(2) 7 Ves. 36; 6 R. R. 76.

any difficulty which might have arisen as to what it was he decided in *Moggridge* v. *Thackwell*. (1) I think the present is a case in which a scheme ought to be directed.

Solicitors: *Alfred Jonas; Treasury Solicitor.*

W. C. D.

In re SEAL (A SOLICITOR). *In re* SEAL & EDGELOW (SOLICITORS).

Practice—Notice of Motion for Attachment—Form of Notice—Extension of Time—Service of Order—Four-day Order.

Before leave to issue a writ of attachment can be obtained, for non-compliance with an order within the time therein limited as extended by a second order, both orders must be served; or if the extended time given by the second order has expired before that order has been drawn up, a four-day order must be obtained and served before moving for attachment.

MOTION.

By an order of July 3, 1902, obtained on the petition of a client, a solicitor was ordered within fourteen days from the service of the order to deliver to the petitioner his bill of fees and disbursements in all suits, actions, and other matters of business in which he had been employed as the solicitor for the petitioner, to be taxed in the usual way. On the same day a similar order was obtained, by the same client, against the firm of which the solicitor was a partner, for delivery of the firm's bill of costs for taxation. Both orders were served on July 8. On the back of each was the usual indorsement under Order XLI., r. 5, calling attention to the liability incurred by neglect to obey the said order by the time therein limited. By an order of August 5 the time fixed by the orders of July 3 was extended, on the application of the solicitors, to August 26. This order was not drawn up. As the bills of costs so ordered to be rendered extended over several years and related to numerous actions and matters they were not delivered within the extended time, and application was therefore made to the petitioner's solicitors for further time, which was refused.

On September 22 application was made in chambers for a

(1) 7 Ves. 36; 6 R. R. 76.

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summons to extend the time for the delivery of these bills of costs; but as the matter was not considered Vacation business no summons was issued. On October 21 notice of motion for leave to issue a writ of attachment against the solicitor and against his firm for their contempt in not having delivered the bills of costs to the petitioner, "pursuant to the orders made herein dated the 3rd day of July and the 5th day of August," was served by the client on the solicitor and his firm. Both motions now came on for hearing together.

A considerable argument was addressed to the Court on the validity and sufficiency of the service of the notice of motion on both the solicitor and his firm; but as the only question eventually decided turned on the form of the notice of motion, the facts and arguments as to the service are omitted.

Rowden, K.C., and *S. Dickinson*, for the client.

Norton, K.C., and *Martelli*, for the solicitor. The notice of motion is bad in form, inasmuch as it asks to commit the respondent for the breach of an order of August 5 which has never been served on him. The client ought either to have had the order of August 5 drawn up and served upon the solicitor, or a fresh peremptory four-day order should have been obtained and served. On a motion to attach or commit, the respondent has a right to avail himself of any objection however technical. This objection is fatal to the motion.

Levett, K.C., and *Austen-Cartmell*, for the firm, took the same objection. It was not necessary to indorse a fresh memorandum on the second order: *Treherne* v. *Dale* (1); but the second order was a fresh order, which ought to have been drawn up and served if non-compliance with this order is to form the basis of a motion of this kind.

Rowden, K.C., in reply. In practice these orders giving an extension of time never are drawn up; as a fact the extended time given by the second order had expired before it was ascertained that there had been a breach of that order, and then it was too late to draw it up. The extension of time so given was not of itself an order: it merely enlarged the time given by the order of July; the notice of motion, in effect, only asks to commit

(1) (1884) 27 Ch. D. 66.

for breach of the order of July as extended by the order of August. The order of August is not in this sense a fresh order which required service.

BYRNE J., after shortly referring to some of the facts, continued:—There has been some discussion before me whether this order of August 5 extending the time for the delivery of these bills of costs was an order in the strict sense of that word; it is certainly referred to as an "order" in the notices of motion, and in my judgment it was an order which could have been drawn up if necessary and served. The time given by this order expired on August 26, and on October 21 notices of motion were served for leave to issue a writ of attachment for contempt in not having delivered these bills of costs "pursuant to the orders made herein" of July 3 and August 5. There appears to have been in the meantime an application to the solicitors of the client for further time which was not successful; but I need not go into that or discuss the merits, if any there be on either side, because a technical objection has been taken that, the second order not having been served, the notice of motion is bad on the face of it; and in cases of this kind a technical objection, if well founded, is sufficient to dispose of the application. It is clear that there has been no formal service upon either the solicitor or his firm of the order of August 5 giving further time: as a fact, that order has never been drawn up. If, as in the present case, an extension of time has been given by a second order, and it is intended to enforce the breach of that order, or of the first order coupled with the second order giving an extension of time, the second order must be drawn up and both orders must be served; or if the extended time given by the second order has expired before that order has been drawn up, a peremptory or four-day order, as it is called, appointing a fresh time within which the act is to be done, should be obtained and served before moving for an attachment. The objection taken to the form of the notice of motion in this case must, in my opinion, be allowed, with the result that both motions fail, and must be dismissed with costs.

Solicitors: *Broughton, Nocton & Broughton; Seal & Edgelow.*

W. C. D.

BUCKLEY J.

1902

Oct. 28, 29.

CARR *v.* ANDERSON.

[1901 C. 2466.]

Felony—Administrator—Sale of Convict's Property—Bona Fides—Action by Convict against his Administrator—Costs—Forfeiture Act, 1870 (33 & 34 *Vict. c.* 23), *ss.* 12, 17, 20, 29.

Under s. 12 of the Forfeiture Act, 1870, the administrator of a convict's property has absolute power to sell the whole or any part of that property as to him shall seem fit, and that power is not restricted by s. 17 to sales for the purposes of the Act—e.g., for the purposes of paying the convict's debts or the costs of his prosecution. The sale must be made bonâ fide, and that involves the exercise of care and judgment; but if made bonâ fide on the part of the administrator, it is binding on the convict irrespective of whether money is wanted or not.

A sale of jewellery made without the special direction of the administrator, but in accordance with a general rule that all such property of small value belonging to convicts shall be forthwith sold, cannot be questioned if it has been made bonâ fide on the part of the administrator.

As a general rule the administrator will be entitled as a trustee to the costs of an action for an account brought against him by the convict after his sentence has expired, but the costs are in the discretion of the Court both under the general jurisdiction of the Court and also under s. 20 of the Forfeiture Act, 1870, if that section applies; but,

Semble, s. 20 adds nothing to the general rule in respect of the costs of an action brought by a convict against his administrator.

Trial of Action.

On July 22, 1895, the plaintiff John Carr was convicted of felony at the Central Criminal Court, London, and was sentenced to six years' penal servitude. Sir Robert Anderson, the Assistant Commissioner of the Criminal Investigation Department at Scotland Yard, was thereupon appointed, under s. 9 of the Forfeiture Act, 1870, administrator of the plaintiff's property; and he took over a considerable amount of property in the possession of the plaintiff at the time of his conviction, including various bonds, shares, jewellery, and real estate. Some of the property was restored to the rightful owners thereof; the management of the real estate was entrusted to solicitors nominated by the plaintiff; the personal estate was realized, and out of the proceeds the administrator paid

737*l.* 16*s.* 6*d.* for the costs of the plaintiff's prosecution. The whole of the plaintiff's personal estate, except four foreign bonds which remained in the hands of the administrator and were alleged to be worthless, was thus sold, and was now represented by 2327*l.* 12*s.* 10*d.* Metropolitan 2½ per cent. Stock and the dividends thereon, 564*l.* 1*s.* uninvested cash, and certain books and papers.

The plaintiff, on obtaining his discharge, applied to Sir Robert Anderson and his successor, Mr. E. R. Henry, for an account and particulars and delivery up to him of his property. He could not get any information, and on July 31, 1901, as soon as his sentence was expired, he brought an action against Sir R. Anderson and Mr. Henry to enforce this claim, and also for damages for the conversion of his property. The defendants took out a summons asking that the plaintiff should give particulars of the property claimed by him, and an order staying the proceedings until he had done so was made by Buckley J. This order was reversed on appeal; and the defendants thereupon delivered an account and gave particulars of the plaintiff's property still in the hands of the police.

The action now came on for trial, and two points were mainly relied upon by the plaintiff: first, that the jewellery had been sold at a great undervalue; and, secondly, that 220 shares of $100 each in the Louisville and Nashville Railway Company belonging to him had been wrongfully converted. He contended that these shares ought not to have been sold at all, inasmuch as the proceeds were not required for the purpose of paying the costs of his prosecution, and that he was entitled to damages because they had recently risen greatly in value. It appeared that according to the practice in the department every step in these administrations had to be authorized by the administrator, but that matters of detail were left to subordinate officers. Carr's jewellery had been sold in accordance with an established practice at Scotland Yard that such effects of convicts of small value should be realized at once without any special directions; Sir Robert Anderson, on the other hand, had given careful personal attention to and obtained the advice of experts in favour of the sale of the

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shares, and had given instructions in general terms that they should be sold. The shares were, however, entrusted by a subordinate officer, since dead, not to a stockbroker, but to a money-changer, were sold for a little less than their market value, and a double commission was paid on the sale.

Astbury, K.C., and *Montague R. Emanuel*, for the plaintiff. Both the jewellery and the railway shares were sold at an undervalue, in an improper way and without the exercise of any care. The power to sell a convict's property is given to the administrator by the Forfeiture Act, 1870. The power to sell is given by s. 12 in absolute terms; but it is qualified by s. 17. By that section a sale must be made bonâ fide and for the purposes "hereinbefore mentioned." Therefore a convict's property can only be sold to the extent necessary to make the payments referred to in ss. 13, 14, 15, and 16. Here the only payment to be made was for the costs of the prosecution, and nothing beyond the 737*l.* 16*s.* 6*d.* ought to have been sold.

By s. 29 the administrator was placed in the position of a trustee, and he ought to have ascertained the convict's wishes as to what part of his property should be sold.

[BUCKLEY J. No. The word "absolute" in s. 12 gives him power to sell as he thinks fit, and s. 17 shews that the convict cannot call in question any sale which is made bonâ fide.]

A sale of property which it is not necessary to sell cannot be a bonâ fide sale. The onus of proving that it was bonâ fide is on the administrator as trustee. The only reason given for the sale of the jewellery is that it is the rule at Scotland Yard to sell all such articles because it is inconvenient to keep them owing to want of space in the warehouse; and that cannot be a bonâ fide reason. The sale of the greater part of the Louisville and Nashville Railway shares was unnecessary; it was not carried out on the Stock Exchange in the usual way, but through a money-changer; they were sold below the lowest price of the day; there is no reliable evidence of the details of the sale, and double commission was paid. The administrator is responsible for the dishonesty of the subordinate who connived at and arranged the sale, and he is liable to pay damages

to the plaintiff measured by the present increased value of the shares. Under s. 29 he ought to have given us an account as a trustee and handed over the property. He declined to do that, and the costs of the action ought to be paid by him. They cannot be made a charge on the property under s. 20, for that section only applies to litigation between the administrator and third parties.

Birrell, K.C., and *T. T. Method*, for the defendants. In the interests of the public service the defendants have thought it their duty to defend this action, and they maintain that the plaintiff cannot call in question anything that has been done, except the payment of the double commission on the sale of the Louisville and Nashville Railway shares. They will account for that and hand over the plaintiff's property, and, further, they do not defend the employment of the money-changer. No doubt the sale of the shares was not properly carried out; but, so far as the administrator was concerned, the sale was ordered by him after personal consideration and in the most complete good faith. The jewellery was sold under the general rule of the department, and no mala fides on the part of the administrator can be shewn. That is the only point to be considered under the Forfeiture Act, 1870. The power of sale given by ss. 12 and 17 is absolute, and there is no reason why we should not have our costs.

[BUCKLEY J. If an administrator has to account under s. 29 as a trustee, he will get his costs out of the trust property in the usual way, unless there is some reason to the contrary. In this case you ought to have handed over the plaintiff's property and delivered an account and particulars without making it necessary that the plaintiff should bring the action. You are now offering to deliver over the property acting merely on information which has been in your possession the whole time. You have gained nothing by defending the action, for in the result you have not found it necessary to put the plaintiff to prove that the property is his.]

We have given way because the Appeal Court decided that we were wrong in the view we took that it was the duty of the plaintiff to identify the property. The costs have really been

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occasioned by the plaintiff's claim for compensation in respect of the sale of the Louisville and Nashville Railway shares. Sect. 20 applies to litigation between a convict and his administrator, and gives us a right to a charge on the property for costs.

[BUCKLEY J. Even if the section does apply, its concluding words give the Court a discretion as to costs.]

As long as there were outstanding claims to the property the administrator was not bound to give up any part of it.

Astbury, K.C., in reply. A sale is not made bonâ fide if the administrator exercises no discretion, and it is admitted that the jewellery was only sold because it was the custom.

[BUCKLEY J. The administrator could exercise his judgment by laying down a general rule.]

He cannot hypothecate his discretion for the future. In respect of the Louisville and Nashville Railway bonds, he is liable for the acts of his subordinate.

[BUCKLEY J. The sale cannot be impeached in this action. The pleadings allege that the sale ought not to have been made, not that it was made in an improper manner.]

As a trustee he cannot set up such a sale, and as a matter of fact no sale has been proved.

BUCKLEY J. referred to the facts, and continued:—I go at once to the Act of Parliament to see what the powers of an administrator are. That Act, passed in the year 1870, abolished the forfeiture of lands and goods for treason and felony, and provided for the appointment by the Crown of an administrator of a convict's property. It gives the administrator certain powers over the convict's property, and amongst them, by s. 12, "The administrator shall have absolute power to let, mortgage, sell, convey, and transfer any part of such property as to him shall seem fit." Wider language it is difficult to conceive. There is an absolute power to sell as to him shall seem fit. This power must, of course, be exercised reasonably and properly; but, so far as that language is concerned, it is an absolute power irrespective of any question as to whether money is wanted for payment of debts or not. Then follow

four sections, 13, 14, 15, and 16, dealing with payments or dispositions which the administrator may make out of or with the convict's property. Then s. 17 runs thus: "The several powers hereinbefore given to the said administrator, or any of them, may be exercised by him in such order and course, as to priority of payments or otherwise, as he shall think fit; and all contracts of letting or sale, mortgages, conveyances, or transfers of property, bonâ fide made by the said administrator under the powers of this Act, and all payments or deliveries over of property bonâ fide made by or under the authority of the said administrator for any of the purposes hereinbefore mentioned, shall be binding; and the propriety thereof, and the sufficiency of the grounds on which the said administrator may have exercised his judgment or discretion in respect thereof, shall not be in any manner called in question by such convict, or by any person claiming an interest in such property by virtue of this Act." It has been contended by the plaintiff's counsel that in reading that section I ought to read the words "for any of the purposes hereinbefore mentioned" as if they qualified the words "all contracts of sale made by the administrator under the powers of this Act." In my opinion that is not the true construction of that section. I think it runs, reading it shortly: "all contracts of sale bonâ fide made by the administrator under the powers of this Act shall be binding, and all payments or deliveries over of property bonâ fide made for any of the purposes hereinbefore mentioned shall be binding"; that the words "for any of the purposes" apply to the latter case only, and not to the former. That being, in my view, the true construction of the Act of Parliament, I go on to state what are the facts as to the sales which the administrator made. If I am right in my construction of the Act of Parliament, all I have to do is to ascertain whether the administrator has made the sale bonâ fide. I agree that that involves that he shall not have made it blindly or carelessly, or without exercising any judgment or discretion upon it, but if he has sold bonâ fide, then that sale is to be binding, and the propriety of it and the sufficiency of the grounds upon which he made it are not to be in any way called

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into question by the convict. [His Lordship stated the facts as to the sale of the jewellery.] This sale of jewellery was made under a course of practice which is universally followed at Scotland Yard. Property of this description of comparatively small value belonging to a convict is, according to the ordinary practice, sold without special directions given in respect of it. Sir Robert Anderson does not recall that he personally gave any instructions as regards the sale of this jewellery; his memory does not serve him in the matter. He says it was sold under an established course of practice. I think that is sufficient for the purposes of the Act of Parliament. It seems to me that a sale thus made is a sale bonâ fide made—a sale made because a reasonable course of practice has been laid down in the office which is followed by the administrator in dealing with that class of property. The only other ground upon which the sale is attacked is this: that it is said, and said truly, that at that time no money was wanted for the purpose of paying any obligation of the convict. If I am right in my construction of the Act of Parliament, that has nothing to do with it. The administrator is not limited to selling for the purpose of paying debts. He has an absolute power to sell as he sees fit if he sells bonâ fide, and he did sell bonâ fide.

[His Lordship then referred to the history of the sale of the railway shares, and continued:—] As far as Sir Robert Anderson is concerned that transaction, upon the face of it, is a perfectly straightforward one. He considered the matter and gave directions to realize the shares. His subordinate, who carried it out for him upon these directions, gave instructions for a sale on the Stock Exchange. The sale was represented to be a sale on the Stock Exchange, and the purchase-money arising therefrom was paid to the receiver. It did not go through Sir Robert Anderson's own hands; it went to the receiver; but, of course, Sir Robert Anderson is accountable for it. [His Lordship referred to the evidence, and said that the officer to whom the sale was entrusted turned out to have been, though there was not the smallest reason for Sir Robert Anderson to suppose it at the time, an unscrupulous and unreliable person, and that something might have taken place

between him and the money-changer which was unknown to the Court, and continued:—]

So far as Sir Robert Anderson was concerned the sale was a sale on the Stock Exchange, and was a sale bonâ fide made by the administrator, and a sale which upon these materials the plaintiff cannot call in question. Supposing, as may be the case, that it would have been competent to him to have brought some action in which he would have set up that the administrator as his trustee had sold these shares in a manner improper, not as having been made when money was not wanted, but as having been made in an unjustifiable manner, or at an undervalue or the like, then, as it appears to me, he ought to have come here upon a pleading alleging the facts, and to have proved them. No such allegation is made in this action. The only allegation is that in lieu of preserving and holding the property the defendant wrongfully sold. I have heard the evidence at length, because in dealing with the affairs of a public department such as this it appears to me to be very necessary that the Court should know all the facts, in order to form as reliable a judgment as possible as to whether the acts of the department have been really bonâ fide. As regards Sir Robert Anderson, I am quite satisfied that what was done was perfectly bonâ fide; but I cannot part with this case without saying that I am startled to find that the affairs of the department at Scotland Yard have been so managed as the evidence has disclosed. No subordinate ought to be allowed to go to a money-changer to ascertain whether shares should be sold or not: that is not a proper way to approach the matter; and there is another point perhaps even more serious, namely, that it appears on the documents themselves that there was a double commission paid—a commission to a broker, and a commission to the money-changer. Mr. Birrell has very fairly said on behalf of Sir Robert Anderson that he cannot support that, and that the double commission cannot be charged. I think the attention of the authorities of Scotland Yard ought to be called to this case, and I should hope that the proceedings there will be more strictly regulated in future. It follows from what I have said that the plaintiff is, in my

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opinion, not entitled to any inquiry as to damages sustained by reason of any improper sale of his property.

I pass on to consider the other question, and that is how the costs of this action ought to be borne. I recognise that an administrator appointed under the Act, particularly in the case of a criminal such as this, has an exceedingly difficult duty to discharge. He has to see that the property which comes to his hands from those of the convict reaches, if possible, its proper destination. Under the circumstances the fact that it comes from the convict's possession may be little or no evidence that it belongs to him. In this case the administrator used his power under the Act of Parliament to deal with a great deal of this property upon the footing that it belonged to other people, and it was handed back to other people. There remained certain property in his hands, and for that under the Act of Parliament, subject to the powers and provisions of the Act, he was responsible to the convict at the expiration of his sentence—that is to say, July 22, 1901.

Before the expiration of the sentence, letters had from time to time been written asking for information. I need not refer to many of them. There is one of March 22, 1900, that is to say, rather more than a year before the sentence expired, in which Sir Robert Anderson, writing in reply to Messrs. Emanuel, Round & Nathan, who were acting for the convict, unfortunately said this: "I have no bonds in my possession belonging to John Carr. Some of those which came into my hands have been given up under the order of the chief magistrate, and others have been sold and the proceeds added to the convict's estate." That, I am sorry to say, was a mistake. Sir Robert Anderson wrote the letter perfectly bonâ fide upon information given, no doubt, by the officer to whom I have referred. It appears that there were still four bonds in his possession. They were supposed to be valueless and they were overlooked, but the statement that there were no bonds in his possession was made. Sir Robert Anderson left his official position in May, 1901, and was succeeded by Mr. Henry. Some of the subsequent letters are written to Mr. Henry; but the mere fact of Sir Robert ceasing to hold his office at Scot-

land Yard did not remove him from the administratorship, and Mr. Henry was only writing on his behalf, and the letters were addressed to him as acting on his behalf. On June 20 Messrs. Emanuel, Round & Nathan wrote asking for particulars of the securities, stating that the sentence would expire in July, and they would like to know how matters stood. On June 22 that was acknowledged. On June 23 Messrs. Emanuel & Co. wrote again, saying the sentence had now expired, and asking for a statement of moneys, securities, and property. On the 24th Mr. Henry acknowledged that, and on the 26th he said another letter would be sent at the earliest possible convenience. On the 29th he ultimately wrote this: "Referring to my letter of the 26th inst., I have now to acquaint you that I have had a formal request made to me by the secretary to the Netherlands Legation not to part with any money in the case of Carr, as he intends taking proceedings as soon as possible with reference to the alleged stolen bonds, presumably under 59 & 60 Vict. c. 52. The French Consulate and the Mannheim Insurance Company also make the same request. For the present I would add that the money is invested in Government securities in the name of the treasurer of the Prisoners' Property Fund, and is not in my possession." After that letter, on July 31 the writ in this action was issued.

The first question to consider with reference to the costs is, Was the plaintiff justified in issuing the writ? It seems to me that he was; he had obtained no information as to what his property was, and I do not think that he would have got it unless he had issued his writ. The action went on, and ultimately in June of the present year a full account was rendered. Then for the first time the convict got his information. Under those circumstances, is he or is he not entitled to say that this action was rendered necessary by the conduct of the trustee? It appears to me that he is. Attention has been called to s. 20 of the Act of Parliament, which provides that "The costs as between solicitor and client of every action or suit which may be brought against the said administrator," and so on, "shall be a first charge upon" the property; and it has been argued that that section deals, not only with actions

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brought against the administrator by third parties, but also with actions brought against the administrator by the convict himself. I think the better opinion is that it does not apply to the latter and for this reason, that the section is not wanted in that case. In an action brought by the cestui que trust against his trustee relating to the trust, the trustee is on general principles entitled primâ facie to his solicitor and client costs. But whether the section applies or not it concludes with these words: "Unless the Court before which such action is tried or such suit is heard shall think fit otherwise to order." So that even if the section applies, I have to consider whether I ought otherwise to order in this case. For the reasons which I have given it seems to me that the plaintiff was entitled to issue his writ, and in seeking to enforce an account he is entitled to say he was put to that expense by the action of the administrator. But, on the other hand, it seems to me that there are some other considerations that I ought to bear in mind. In the first place, the administrator would certainly be entitled to all his costs of rendering the accounts. On accounting fully for all the trust property, and giving up the trust property, he would he entitled to his costs of taking his accounts, and, therefore, would be entitled to receive some costs. Further, I cannot shut my eyes to the fact that the great question which has been litigated before me here is the question whether the convict is entitled, as against the administrator, to damages in respect of the wrongful conversion of his property, on which I hold the plaintiff to be wrong. It seems to me, therefore, that although the plaintiff has a claim in respect of the costs of the action on the ground that it was necessitated by the conduct of the administrator, the administrator on the other hand, in respect of certain matters, is entitled to claim costs as against the plaintiff; and I think that I shall do justice as between the parties by saying that the plaintiff's property must be delivered up to him, and that there shall be no costs of the action.

Solicitors: *Emanuel, Round & Nathan; Wontner & Sons.*

H. C. R.

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Nov. 4, 5, 6.

[1902 A. 127.]

Local Government—Urban Authority—By-laws—New Street—Special Remedy—Penalty recoverable by Summary Proceedings—Injunction—Jurisdiction—Attorney-General as Co-plaintiff—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 158, 183, 251, 253.

Where persons are laying out a new street in such a manner as not to comply with the requirements of by-laws made by a local authority under the Public Health Act, 1875, which prescribe a penalty for infringement recoverable by summary proceedings before justices, the High Court of Justice has jurisdiction to enforce the by-laws by injunction in an action brought by the Attorney-General at the relation of the local authority and by the local authority.

THIS action was commenced in January, 1902, by the Ashborne Urban District Council, which was the local authority having control over new streets and buildings in the urban sanitary district of Ashborne, Derbyshire, for a declaration that the defendants, the Ashborne Recreation Ground Company, Limited, and Thomas Smith (who was acting as contractor for the defendant company in respect of the work complained of), were laying out or had laid out a new street in contravention of the provisions of the council's by-laws in that behalf—a portion of the street being less than the required width of thirty-six feet—and for an injunction to restrain the defendants, their servants and agents, from so laying out the new street.

The defendants, by their statement of defence delivered in April, 1902, submitted that the action would not lie, and that the only remedies open to the plaintiffs were those prescribed in s. 158 of the Public Health Act, 1875, and the council's by-laws.

In consequence of the decision of Joyce J. in *Devonport Corporation* v. *Tozer* (1), the proceedings were amended by joining the Attorney-General as a co-plaintiff, at the relation of the council.

(1) [1902] 2 Ch. 182.

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At the trial the defendants took the preliminary objection that, even with the Attorney-General as co-plaintiff, the action would not lie.

Macmorran, K.C., and *Hextall*, for the plaintiffs.

Macaskie, K.C., and *Peterson*, for the defendants. There is a preliminary objection that, even now when the Attorney-General has been joined as a co-plaintiff, the action cannot be maintained.

Sect. 157 of the Public Health Act, 1875, enables the urban authority to make by-laws with respect to (amongst other things) the width of new streets. Under s. 158 of the same Act, works done in contravention of by-laws may be removed, and where a penalty is imposed the existence of the work in contravention of the by-law is to be a continuing offence. By s. 251, all offences under the Act, and all penalties directed to be recovered in a summary manner, "may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a Court of summary jurisdiction." By s. 253, proceedings to recover penalties under the Act cannot, except in certain cases, be taken by any person other than the party aggrieved, or by the local authority, without the consent in writing of the Attorney-General.

It cannot be disputed that penalties imposed by by-laws under the Act are recoverable summarily, and in the present case there is a penalty for the contravention of the by-laws as to the width of new streets. Where a new statute makes a new offence which was in "no way previously prohibited by the common law, and appoints a peculiar manner of proceeding against the offender," then the particular remedy must be observed: *Reg.* v. *Hall.* (1) Where the statute gives a right to proceed in a Court of summary jurisdiction, the High Court has no jurisdiction: *Barraclough* v. *Brown.* (2) Where by-laws under the Act of 1875 prescribe a penalty to be recovered by summary proceedings, the local authority cannot enforce the by-laws by injunction: *Devonport Corporation* v. *Tozer.* (3)

(1) [1891] 1 Q. B. 747, 753. (2) [1897] A. C. 615.
(3) [1902] 2 Ch. 182.

That is a direct authority that the council could not sue without joining the Attorney-General as a plaintiff, and the council, adopting this view, have therefore joined him as a co-plaintiff. But even with the Attorney-General as a plaintiff, an action cannot be maintained for an injunction to restrain an act which is in contravention of the council's by-laws. *Cooper* v. *Whittingham* (1) was relied on in *Devonport Corporation* v. *Tozer* (2) as an authority for the proposition that an injunction could be granted; but Joyce J. held that it had no application to the case. (3)

Where Parliament intends that the Attorney-General shall have the right to commence proceedings, the Act so provides. Here the statute provides that either by by-laws—which may impose penalties—or by pulling down or removal, there shall be a particular remedy for things done in contravention of the Act and by-laws, and in those cases an injunction cannot be granted.

[BUCKLEY J. referred to *Hendon Local Board* v. *Pounce* (4); *St. George's Local Board* v. *Ballard.* (5)]

The objection was not taken in those cases. The High Court will not, where property is not affected, grant an injunction to restrain the commission of a crime: *Emperor of Austria* v. *Day* (6); *Springhead Spinning Co.* v. *Riley.* (7)

In the present case the property of the council is not affected by the street being of less than a particular width. Under the by-laws it may, if the street is of insufficient width, proceed summarily to enforce a penalty, but those proceedings relate to a criminal matter: *Mellor* v. *Denham.* (8) Sect. 183 of the Act of 1875 gives power to the local authority to impose a penalty by its by-laws for breaches of by-laws made under s. 157, and as that remedy is provided, and there is no offence except by statute, even the remedy by indictment cannot be resorted to: *Reg.* v. *Hall.* (9)

The proposition of Jessel M.R. in *Cooper* v. *Whittingham* (1)

(1) (1880) 15 Ch. D. 501.
(2) [1902] 2 Ch. 182.
(3) Ibid. 194.
(4) (1889) 42 Ch. D. 602.
(5) [1895] 1 Q. B. 702.
(6) (1861) 3 D. F. & J. 217, 239.
(7) (1868) L. R. 6 Eq. 551.
(8) (1880) 5 Q. B. D. 467.
(9) [1891] 1 Q. B. 747.

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that an injunction can be granted under the Judicature Act, 1873, s. 25, sub-s. 8, where the Court had not before the Act power to give any remedy cannot be supported after *North London Ry. Co.* v. *Great Northern Ry. Co.* (1); *Devonport Corporation* v. *Tozer.* (2)

[They also referred to *Attorney-General* v. *Great Northern Ry. Co.* (3); Stephen's Commentaries, 4th ed. vol. iv. p. 440.]

Macmorran, K.C., and *Hextall*, for the plaintiffs. The fiat of the Attorney-General was obtained in consequence of the decision in *Devonport Corporation* v. *Tozer.* (2) Prior to that time it had always been assumed that the action could be maintained without the Attorney-General being joined as a plaintiff.

North J., in an action in which the Attorney-General was a plaintiff, granted an injunction restraining the defendants from laying out a new street of less than the required width: *Attorney-General* v. *Rufford & Co.* (4)

The Court of Appeal, in a case arising on s. 155 of the Act of 1875, where an injunction was asked for, assumed that there was jurisdiction, but decided that the case was not within the section: *Attorney-General* v. *Hatch.* (5) The same Court granted an injunction to restrain land being so used as to be a public nuisance: *Attorney-General* v. *Tod Heatley.* (6)

Reg. v. *Hall* (7) simply decides that, where the statute creates a new offence and imposes a penalty, an indictment will not lie.

The Attorney-General can always maintain an action for an injunction to restrain an illegal act which tends to the injury of the public: *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (8)

He may restrain a public body with statutory powers from infringing a provision of the statute inserted in the interests of the public without proving actual injury: *Attorney-General* v. *London and North Western Ry. Co.* (9) The object of the Act

(1) (1883) 11 Q. B. D. 30.
(2) [1902] 2 Ch. 182, 189.
(3) (1860) 1 Dr. & Sm. 154.
(4) [1899] 1 Ch. 537.
(5) [1893] 3 Ch. 36.
(6) [1897] 1 Ch. 560.
(7) [1891] 1 Q. B. 747.
(8) (1882) 21 Ch. D. 752.
(9) [1900] 1 Q. B. 78.

of 1875 is that, when new streets are laid out, public convenience is to be considered with reference to the width of them.

The local authority cannot sanction plans which are in contravention of its by-laws properly made: *In re McIntosh and Pontypridd Improvements Co.* (1); *Yabbicom* v. *King*. (2)

Where the Attorney-General is suing on behalf of a relator, he is the only person who has to decide whether the machinery of the first law officer of the Crown is to be put into operation: *London County Council* v. *Attorney-General*. (3)

Macaskie, K.C., in reply. There is no case in which it has been held that the Attorney-General can proceed for an injunction where a new offence is created by statute, and a penalty recoverable by summary proceedings is enjoined. In the cases cited the point was not taken. *Attorney-General* v. *London and North Western Ry. Co.* (4) was the case of an indictable misdemeanour. In *London County Council* v. *Attorney-General* (3) Lord Halsbury was referring to the discretion of the Attorney-General, not the jurisdiction of the Court.

BUCKLEY J. In this case the Attorney-General, at the relation of the council, and the council itself sue for a declaration that the defendants are acting in contravention of the by-laws made by the council, and for an injunction to prevent them from so doing. The defendants take a preliminary objection that the action will not lie, and say that, even with the Attorney-General joined as a plaintiff, the action cannot be maintained. The council having the powers of making by-laws given to urban authorities by s. 157 of the Public Health Act, 1875, have made by-laws which, amongst other things, prescribe the width of new streets. They say that the defendants are proceeding in breach of the by-laws (which for the purpose of this preliminary objection I assume to be the case) and ask for an injunction. The defendants say that the Act has created a new offence in respect of which it has imposed a certain penalty, and that there is no remedy by way of injunction. It

(1) (1891) 61 L. J. (Q.B.) 164.
(2) [1899] 1 Q. B. 444.
(3) [1902] A. C. 165, 168.
(4) [1900] 1 Q. B. 78.

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is not quite accurate to say that the Act has imposed a penalty. The Act has not itself imposed any penalty, but has by s. 183 enabled the local authority to impose a penalty by by-laws for that purpose. The local authority has in the present case made such a by-law. The fact, therefore, is that the statute has enjoined something; has itself imposed no penalty; but has provided machinery by the use of which a penalty may be imposed, and that that machinery has been employed. The defendants say that, because by-laws have been made and there is a remedy under s. 251 to recover the penalty in a summary manner, there is no jurisdiction in the High Court to grant an injunction.

In *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1) Willes J. states certain general principles, as follows: "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy." This case is not within that class, for there was not, as regards the matter of which the plaintiffs complain, any remedy at common law before the statute; the obligation was created by the statute. Then Willes J. proceeds to say: "The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there the party can only proceed by action at common law." In a sense, the case before me falls within that class, because if no by-laws are made no particular form of remedy is provided. But, seeing that a by-law has been made, I will assume that the case before me is not within this class. "But there is a third class," says the same learned judge, "viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided

(1) (1859) 6 C. B. (N.S.) 336, 356.

by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue." I will assume that the present case comes within the third class. In cases within that class the statutory remedy must in general be followed, but there is at least one exception to the general rule. There may co-exist a remedy by injunction to protect a right. It cannot be disputed, after *Cooper* v. *Whittingham* (1), that if a plaintiff is suing in respect of a right personal to himself he may be protected by injunction. In that case the plaintiffs brought an action for injunction to restrain an infringement of their copyright. That infringement was a statutory offence in respect of which a penalty was imposed by statute. Jessel M.R. said: "It was said that the 17th section of the Act"—the Copyright Act, 1842—"created a new offence of importation and enacted a particular penalty, and it was argued that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which, if done, would be an offence. Whenever an act is illegal and is threatened, the Court will interfere and prevent the act being done." He then mentioned a second exception, which, after *North London Ry. Co.* v. *Great Northern Ry. Co.* (2), cannot be relied on. Then it is argued that the defendants' objection can be sustained because the plaintiffs' claim is not based on any right of property, but only on the fact that what has been done is an interference with public rights in respect of a highway. I think that is not sound. The Attorney-General suing in respect of the invasion of public rights has at least as large a right to invoke the protection of the Court as a private owner suing in respect of his

(1) 15 Ch. D. 501, 506. (2) 11 Q. B. D. 30.

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rights. Judges, both of first instance and of the Court of Appeal, although the point has apparently not always been taken, have assumed and North J. has decided that in such cases the Attorney-General can sue, for instance in *Attorney-General* v. *Hatch* (1)—a case as to building otherwise than in accordance with a prescribed building line; in *Attorney-General* v. *Rufford & Co.* (2)—a case as to the width of a street; and *Attorney-General* v. *London and North Western Ry. Co.* (3) The last case was somewhat different from the present, because there was there a statutory offence but no penalty imposed; but for this purpose no distinction is to be drawn between cases where a penalty is imposed and those in which a statutory duty is enjoined but no penalty is imposed. From the report of *Attorney-General* v. *Rufford & Co.* in 80 L. T. 17, it appears that the defendant company took the preliminary objection that the by-laws fixed a penalty to be recovered before magistrates; that the plaintiffs ought to have proceeded before the magistrates, and that the High Court, even if it had jurisdiction to grant an injunction, would not exercise it when the Legislature had pointed out the remedy, but that North J. overruled the objection and granted an injunction. Moreover, there may be good reason why an injunction should be granted although a penalty is imposed. If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made by-laws. Under s. 158 of the Act of 1875 works contravening by-laws may be pulled down or removed, but only where the work is commenced after notice of disapproval, or before the expiration of one month after the delivery of notice to the public authority, without the approval of such authority; so that, if the public authority is inert, it may become powerless to pull down or remove; and, if the defendants are right, its only remedy would be to proceed by way of penalty. That cannot be the intent of the statute. Another reason is that there are many cases where a public authority can interfere in which pulling down would be

(1) [1893] 3 Ch. 36. (2) [1899] 1 Ch. 537; 80 L. T. 17.
(3) [1900] 1 Q. B. 78.

an inappropriate remedy. For instance, under s. 23 of the Public Health Acts Amendment Act, 1890, by-laws may be made as to such things as the sufficient supply of water for flushing closets. The Act did not intend that the public right to have these things done should be guarded only by a penalty in case they are not done. For these reasons I overrule the defendants' objection.

The trial of the action was accordingly proceeded with, and an injunction was granted.

Solicitor for plaintiffs: *J. B. Conder, for Bamford, Son & Wilson, Ashborne.*

Solicitors for defendants: *Taylor, Hoare & Pilcher, for Wise & Cooke, Ashborne.*

F. E.

BOYCE *v.* PADDINGTON BOROUGH COUNCIL.

[1901 B. 3303.]

Burial Ground—Open Space—Hoarding to prevent Acquisition of adjoining Owner's Right to Light—"Building"—Non-joinder of Attorney-General—Metropolitan Open Spaces Act, 1877 (40 & 41 *Vict. c.* 35), *s.* 1—*Metropolitan Open Spaces Act,* 1881 (44 & 45 *Vict. c.* 34), *ss.* 4, 5—*Disused Burial Grounds Act,* 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

A churchyard was an "open space" within the Metropolitan Open Spaces Acts, 1877 and 1881, and a "disused burial ground" within the Disused Burial Grounds Act, 1884. Under the Acts of 1877 and 1881 it was to be held for the perpetual use thereof by the public "for exercise and recreation" "in an open condition free from buildings," except (as provided by the Act of 1884) for the purpose of enlarging the existing church.

The plaintiff, shortly before action, erected buildings on land abutting on the churchyard, with windows overlooking it. The local authority (having control over the churchyard as an open space) thereupon resolved to erect a hoarding in it to obstruct the access of light to the plaintiff's windows with a view to preventing him from gaining a prescriptive right to the access of light over the churchyard, and the plaintiff brought an action for an injunction to restrain them from doing so:—

Held, (1.) that, as the plaintiff was suing either in respect of an alleged private right to the access of light, or in respect of an alleged interference with a public right from which he personally sustained special damage, he could sue without joining the Attorney-General as a plaintiff; but (2.) that

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the Acts did not create any easement of light or otherwise for the benefit of adjoining owners, or any right other than a right in the public to enjoy the churchyard as an open space (subject to the right to extend the church); (3.) that the hoarding was not a building within s. 5 of the Act of 1881 or s. 3 of the Act of 1884.

The action was accordingly dismissed.

A plaintiff can sue without joining the Attorney-General in two cases, (*a*) where an interference with a public right involves interference with some private right of the plaintiff; and (*b*) where no private right of the plaintiff is interfered with, but he, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

THE churchyard of St. Mary's Church, Paddington, was an "open space" within the Metropolitan Open Spaces Acts, 1877, 1881, and 1887, and the Disused Burial Grounds Act, 1884.

Thomas Boyce was the owner of a leasehold piece of land abutting on the churchyard, on which he had recently erected blocks of flats with windows overlooking the churchyard. The borough council of Paddington, in January, 1901, passed a resolution directing their surveyor to erect a screen or hoarding in the churchyard to obstruct the light to the windows, and the present action was brought by Boyce against the mayor, aldermen, and councillors of the metropolitan borough council of Paddington and the vicar of Paddington (in whom the soil and freehold of the churchyard were alleged to be vested, and who was also alleged to be a party to the resolution as a member of the council) for an injunction to restrain the defendants from erecting the screen.

The action came on for trial before Buckley J. on November 3, 1902.

Astbury, *K.C.*, and *Mark Romer*, for the plaintiff. The churchyard is an open space within the meaning of the Metropolitan Open Spaces Acts, 1877 (40 & 41 Vict. c. 35) and 1881 (44 & 45 Vict. c. 34), and the Open Spaces Act, 1887 (50 & 51 Vict. c. 32), and is a disused burial ground within the meaning of the Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72).

Under s. 1 of the Act of 1877 an open space, when acquired under the Act, is to be held "in trust for the perpetual use thereof by the public for exercise and recreation."

Sect. 4 of the Act of 1881 gave power to transfer any churchyard or the control of it within the metropolis, closed for burials, to the local authority "for the purpose of giving the public access" thereto and "preserving the same as an open space accessible to the public"; and by s. 5 of the same Act the local authority is to hold and administer the property "in trust to allow, and with a view to, the enjoyment by the public of such open space, churchyard, cemetery, or burial ground in an open condition, free from buildings," and power is given to "inclose or keep the same inclosed with proper railings and gates."

By s. 3 of the Act of 1884, "it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other place of worship."

The plaintiff, as a member of the public, is entitled to the benefit of the statutes which say that this churchyard shall be kept as an open space, and if the hoarding is erected the churchyard will no longer be an open space, and he will suffer substantial damage peculiar to himself by the interruption by the erection of the hoarding of the access of light over the burial ground to his windows. He is, therefore, entitled to maintain the action without joining the Attorney-General as a co-plaintiff: *Winterbottom* v. *Lord Derby*. (1)

A hoarding is a building within the meaning of the Acts of 1881 and 1884. It is the same thing as a screen, which Romer J. held to be a building: *Wood* v. *Cooper*. (2) Kekewich J. held that an advertisement hoarding was not a building within the meaning of a peculiarly worded covenant: *Foster* v. *Fraser*. (3)

[They also referred to *Vicar of St. Botolph, Aldersgate Without* v. *Parishioners of the Same*. (4)]

H. Terrell, K.C., and *T. A. Nash*, for the defendant council. The plaintiff has no cause of action. The only person who can bring an action if public rights are being interfered with is the Attorney-General, and he is not a party to this action. The

(1) (1867) L. R. 2 Ex. 316.
(2) [1894] 3 Ch. 671.
(3) [1893] 3 Ch. 158.
(4) [1900] P. 69.

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plaintiff has no legal right to the access of light to his windows. His object in these proceedings is to prevent the windows being obstructed, so that he may acquire a prescriptive right to light. It is a case of damnum absque injuria. In order to be in a position to maintain an action for an interference with a public right, the plaintiff must shew that he has suffered some private injury beyond the damage suffered by other members of the public: *Lyon* v. *Fishmongers' Co.* (1); *Stoke Parish Council* v. *Price* (2); *Ricket* v. *Metropolitan Ry. Co.* (3)

A hoarding put up to prevent the access of light is not a building within the meaning of either Act: *Wilson* v. *Queen's Club.* (4)

[They also referred to *Liverpool Corporation* v. *Chorley Waterworks Co.* (5); *Slaughter* v. *Sunderland Corporation.* (6)]

C. A. Montague Barlow, for the vicar of Paddington.

Astbury, K.C., in reply. *Lyon* v. *Fishmongers' Co.* (1) is in our favour, for the plaintiff is suing in respect of an interference with the enjoyment of his private property. Although a public right is interfered with, inasmuch as the plaintiff thereby suffers particular damage, he can maintain an action: *Iveson* v. *Moore.* (7) *Wilson* v. *Queen's Club* (4) has no bearing on a case like this. [He also referred to *Pocock* v. *Gilham* (8); The Century Dictionary, title "Building."]

Cur. adv. vult.

Nov. 8. BUCKLEY J. When stripped of all technicality the question to be determined in this action is whether the owners of lands circumjacent to and abutting upon other land which has become an open space within the Metropolitan Open Spaces Acts, 1877, 1881, and 1887, and the Disused Burial Grounds Act, 1884, become at once, by virtue of those Acts—or must be allowed to become, after the period of the Prescription Act, by virtue of an enjoyment which cannot be excluded by the erection of a hoarding—entitled as of right to

(1) (1876) 1 App. Cas. 662.
(2) [1899] 2 Ch. 277.
(3) (1867) L. R. 2 H. L. 175.
(4) [1891] 3 Ch. 522.
(5) (1852) 2 D. M. & G. 852.
(6) (1891) 65 L. T. 250.
(7) (1698) 1 Ld. Raym. 486.
(8) (1883) 1 Cab. & E. 104.

the access of light to the windows of any buildings which they may erect contiguous to the open space.

The open space in question is the disused burial ground of St. Mary's, Paddington. The plaintiff is a person who has recently erected a large block of flats immediately abutting upon that open space, with numerous windows overlooking it. The defendants contend that they are entitled to erect a hoarding in front of those windows, so as to prevent the plaintiff from prescribing for rights of light. The plaintiff says they are not so entitled, and rests his case upon two grounds. He says, first, that he, as a member of the public, is entitled to insist that the space shall be an open space, from which it results that there will be free access of light to his windows; and, secondly, that, whether this is so or not, the defendants cannot erect a hoarding so as to prevent his becoming entitled by prescription, because they are by the relevant Acts of Parliament forbidden to erect any building, temporary or movable, except for the purpose of enlarging the church. A hoarding erected for the purpose of preventing the acquisition of a prescriptive right to light is, he says, a building.

The defendants have raised the contention that the plaintiff cannot maintain the action without the concurrence of the Attorney-General. This contention, to my mind, cannot succeed. The plaintiff is suing either in respect of an alleged right to the free access of light to his windows over the open space, or in respect of a public right to have the space maintained as open and without the erection of a hoarding, which he calls a building. In the former case he is suing upon an alleged private right; there is no public right of access of light to private property. In the latter he is suing in respect of an interference with a public right from which he personally sustains special damage. In either case he can sue without joining the Attorney-General.

The public are not the owners of lights overlooking the space, and there is no public right to access of light to any such windows. The public right is to have the open space so kept as to allow the enjoyment by the public of the space in

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an open condition, free from buildings. That right the plaintiff is entitled to as a member of the public; but any right of access of light to the windows of his property is not a public right. It is not a right which he enjoys as one of the public, or which any member of the public enjoys in common with himself. If, therefore, he claims upon the footing that he has a right to the access of light to his windows, he is suing in respect of a private, and not a public, right, and the Attorney-General is not a necessary party.

Further, if he is suing in respect of his right as a member of the public to say no building shall be put on the land, and if this hoarding is a building, there he would be suing in respect of a public right, and the Attorney-General would be a necessary party but for the further fact that the plaintiff personally (upon this hypothesis) suffers special damage from the breach of a public right, and, if he do so suffer, then he can sue without joining the Attorney-General.

A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. The former proposition, I think, is to be deduced from *Lyon* v. *Fishmongers' Co.* (1) and *Fritz* v. *Hobson* (2), and was one which I had to consider in *Chaplin & Co.* v. *Westminster Corporation* (3); while the latter is to be found in *Iveson* v. *Moore* (4), *Hart* v. *Basset* (5), *Benjamin* v. *Storr* (6), and *Winterbottom* v. *Lord Derby*. (7) I think, therefore, that the action is well consti-

(1) 1 App. Cas. 662.
(2) (1880) 14 Ch. D. 542.
(3) [1901] 2 Ch. 329.
(4) 1 Ld. Raym. 486.
(5) (1681) 4 Vin. Abr. 519.
(6) (1874) L. R. 9 C. P. 400.
(7) L. R. 2 Ex. 316.

tuted, and I pass on to consider whether the plaintiff has the right which he claims.

At the outset it would seem to be an extraordinary proposition that, because an open space is devoted to the public for enjoyment in an open condition, free from buildings, for exercise and recreation (see Metropolitan Open Spaces Act, 1877, s. 1, Act of 1881, s. 5), the result should be to give immediately, or by the unavoidable operation of the Prescription Act, to the circumjacent owners, as matter of right, an easement of light which theretofore they had not enjoyed. I may point to one case in which such a construction certainly is not admissible.

A disused burial ground which is so dealt with as to become an open space under these Acts may nevertheless be used for the purpose of enlarging a church, chapel, meeting-house, or other place of worship: see the Act of 1884, s. 3. If the plaintiff's proposition were true, the owner of the adjoining land would, after the Prescription Act had run, become (without any power on the part of the owners of the open space to prevent his becoming) entitled to rights of light over the open space which might prevent the subsequent erection of such an enlargement as that Act allows.

The proposition for which the plaintiff contends is evolved from the premiss that because the space is to be an open space, therefore there must be free passage of light over it to the windows of houses built on the adjacent land. This begs the question and assumes that a hoarding cannot be erected. The Acts do not contemplate the statutory creation of any such consequential rights in the neighbouring owners. The space is to be open for the public purposes for which it is to be enjoyed—that is, for exercise and recreation. It is not to be open so as to create rights in favour of adjoining landowners. The statute is not dealing with the creation of easements or the creation of any right other than a right in the public to enjoy the space as an open space for the purposes indicated in the Acts. As an adventitious advantage the owner of the adjoining land would, no doubt, in most cases in fact obtain the benefit of air and light. But he is not, I think, entitled to

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it as a matter of right. The rights created are public rights. There is no public right to have free access of light to windows on the land surrounding the open space, or any part of it. The plaintiff's contention really is that he has that right which would be a private right because there is another and a different public right.

But then the plaintiff says, "Assume that by virtue of the statute I do not immediately acquire an easement, still, as a member of the public, I have a right to insist that no building shall be put upon the open space, and if no building (which I say includes a hoarding for the purpose of preventing a prescriptive right) is put up I shall, under the Prescription Act, get a right in time, and the effect of the Acts is that matters must be so left as that I shall acquire that right." This argument is rested upon a contention that a hoarding put up for the purpose of preventing the plaintiff prescribing under the Prescription Act is a building. Several cases have been referred to as to whether a hoarding is a building. In *Pocock* v. *Gilham* (1) and *Wood* v. *Cooper* (2) it was held that a hoarding or a screen was, and in *Slaughter* v. *Sunderland Corporation* (3), *Wilson* v. *Queen's Club* (4), and *Foster* v. *Fraser* (5) that it was not, a building.

From these cases I can derive no principle other than this—that a hoarding may or may not, according to the context, be a building. If the building spoken of be one which it is contemplated shall have a stuccoed front and a slate roof—*Foster* v. *Fraser* (5)—or a building to be erected under a building lease—*Wilson* v. *Queen's Club* (4)—a hoarding will not be a building. If the question arises under a lessee's covenant not to put up a building, and he does put up a hoarding which affects the adjoining occupier—*Pocock* v. *Gilham* (1) and *Wood* v. *Cooper* (2)—it may be a building. What I have to consider is whether such a hoarding as the defendants would put up to prevent the plaintiff from acquiring prescriptive rights would be a building within the Acts with which I have to deal. In

(1) 1 Cab. & E. 104.
(2) [1894] 3 Ch. 671.
(3) 65 L. T. 250.
(4) [1891] 3 Ch. 522.
(5) [1893] 3 Ch. 158.

my opinion it would not. It would be an erection, put up not for any purpose of building, but as an erection necessary to prevent the acquisition of a prescriptive right. The word in s. 5 of the Act of 1881 occurs in the connection that the land is to be enjoyed "in an open condition free from buildings." I think this means such buildings as would preclude or diminish its enjoyment in an open condition for exercise and recreation (Act of 1877, s. 1). In s. 3 of the Act of 1884 the erection of any buildings upon a disused burial ground is forbidden except for the purpose of enlarging a church. I think the word "buildings" there means erections which would cover some part of the ground, as the enlargement of a church would do. It does not refer to something in the nature of a fence or barrier to prevent the acquisition of prescriptive rights to light.

Upon these grounds I come to the conclusion that the plaintiff has not by virtue of the Acts acquired such an easement as he seeks to enjoy, and that the defendants are not by the Acts precluded from erecting such a hoarding as is necessary to prevent him from obtaining the benefit of the Prescription Act.

I think, therefore, that the action fails, and I dismiss it with costs.

Solicitors for plaintiff: *Cheston & Sons.*
Solicitor for defendants: *John H. Hortin.*

F. E.

JOYCE J. 1902 Nov. 11, 12.

MAPPIN BROTHERS *v.* LIBERTY & CO., LIMITED.

[1901 M. 2848.]

Highway—Ownership—Soil of Highway—Street in Town—New Street—Crown Lease—Presumption that Soil of Highway ad medium filum passes to adjoining Owner—Rebuttal of Presumption.

The Commissioners of Woods and Forests acquired a tract of land under an Act of Parliament passed for the purpose of executing a scheme of street improvements in the metropolis. Under this Act they made Regent Street and leased the houses in the street as they were built, including a house now sub-demised to the plaintiff. The plaintiff claimed to be entitled to the soil of the moiety of the street next to his house for the residue of his interest therein by virtue of the presumption that the conveyance of a house adjoining a highway passes the soil of the highway usque ad medium filum. The head lease of the plaintiff's house described the property by dimensions and abuttals and by a map, and referred to it as abutting on a street then forming. Upon the construction of the Act it was doubtful whether the Commissioners had any power to lease the soil of the street:—

Held, that apart from any question as to the powers of the Commissioners, the presumption was rebutted by the surrounding circumstances, regard being had to the terms of the lease and the provisions of the Act.

THE plaintiff under the name of Mappin Brothers carried on business at No. 220, Regent Street. The defendants Liberty & Co., Limited, carried on business at Nos. 218 and 222, which adjoined the plaintiff's premises on either side. The defendant company had recently constructed a tunnel through the subsoil of Regent Street in front of the plaintiff's premises for the purpose of connecting their two houses. The plaintiff was in possession of No. 220 under a sub-lease for a term of fifty years from March 25, 1869, and by virtue of this interest he claimed to be entitled to the soil of the street adjoining his house usque ad medium filum viæ for the residue of the term. The plaintiff complained that the building of this tunnel by the defendant company was a trespass on his property, and brought this action for an order directing the defendant company to remove the tunnel and to restore the soil to the state in which it was before the tunnel was made.

It appeared that all the premises in question in this action

were built upon land forming part of a larger tract of land acquired by the Commissioners of Woods and Forests under an Act of Parliament passed in 1813 (53 Geo. 3, c. 121) intituled "An Act for making a more convenient communication from Marylebone Park and the northern parts of the metropolis in the parish of St. Marylebone to Charing Cross within the liberty of Westminster, and for making a more convenient sewage for the same." It was under this Act that Regent Street was made. By this Act the Commissioners of Woods and Forests, for the purpose of carrying out the proposed alterations and improvements, were empowered to purchase certain properties described in a map deposited at the office of the Commissioners (s. 14), and to raise a sum of 500,000*l.* for this purpose (s. 44); they were authorized to make certain new streets and squares, including the street now known as Regent Street; and in laying out any new street they were required to provide in the first instance for the paving, lighting, and watching thereof; but the future expenses in respect of these matters were to be borne by the parish (ss. 8, 41). The Commissioners were also empowered to make a new sewer under Regent Street to the river Thames (s. 79). The provisions as to paving, watching, and lighting were, however, repealed by an amending Act passed in 1816 (56 Geo. 3, c. 128), whereby a new body of paving commissioners was appointed, consisting of the Commissioners of Woods and Forests and certain other persons. These Commissioners were thereby authorized to pave and repair the streets referred to in the principal Act, and the property in the pavement was vested in them.

Sect. 34 of the principal Act, the marginal note to which was, "Commissioners empowered to sell, exchange or lease premises not wanted for purposes of Act," empowered the Commissioners, with the consent therein mentioned, "absolutely to sell and dispose of all or any part of the houses, buildings, lands, tenements and hereditaments, of or belonging to His Majesty, his heirs and successors, in the lines of the said streets and places respectively to be erected and built, altered, repaired or improved, under or by virtue of this Act,

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or which shall be so purchased or acquired as aforesaid, and shall not be wanted for the purposes of this Act." Then followed a power of exchange, and the section then proceeded as follows: "and also to demise or lease, or previous to any such demise or lease to enter into any contract or agreement for the demising or leasing, with such consent and approbation as aforesaid, all or any part of the houses, buildings, lands, tenements and hereditaments to be purchased, erected, built, altered, repaired and improved, under or by virtue of this Act," for any term not exceeding ninety-nine years from the making thereof at such rent and subject to such covenants and conditions as the Commissioners should think proper. And the section further provided that all conveyances, exchanges, and leases to be made by the Commissioners might be made according to the forms set forth in the schedule annexed to the Act.

On September 11, 1820, the Commissioners entered into an agreement with George Thompson, a builder, for the lease to him or to his nominees of Nos. 218 and 220, Regent Street.

On February 7, 1823, the Commissioners granted a lease in the form prescribed by the Act of No. 220, Regent Street, to Messrs. Thomas and Charles Butler, on the nomination of Thompson, for a term of ninety-nine years from January 5, 1821. The demised property was delineated in colour in a map drawn in the margin of the lease, and was described in the parcels as "All that piece or parcel of land situate, lying, and being in the parish of St. James within the liberty of Westminster, in the county of Middlesex, on the east side of a street now forming there called or intended to be called Regent Street, abutting west on the said street, east on King Street, in the parish of St. James, Westminster, aforesaid, north on a messuage or dwelling-house lately erected and built on ground belonging to the Crown, on the east side of Regent Street aforesaid, now leased to the said George Thompson, and south on another messuage or dwelling-house and premises also lately erected and built on ground belonging to the Crown, on the east side of Regent Street aforesaid, and now leased to William Burrage." Then followed the dimensions of the pro-

perty, which with the abuttals, boundaries, and dimensions thereof was stated to be more particularly delineated in the map drawn in the margin of the lease. The lease then contained the following general words: "And also all outhouses, buildings, yards, areas, vaults, cellars, sollars, ways, paths, passages, waters, watercourses, lights, easements, profits, privileges, advantages, emoluments, rights, members, and appurtenances whatsoever to the said piece or parcel of ground, messuage, or dwelling-house and premises hereby demised or any part thereof belonging or in any wise appertaining."

The description of the property in the parcels and in the map did not include any part of the soil of Regent Street. In point of fact, however, certain vaults which were underneath the street and were partly in front of No. 120 and partly in front of No. 122, had always been held under this lease, but they were not referred to in the lease otherwise than by the general words. This lease having become vested in Mr. C. H. Savory, he on March 25, 1869, granted an underlease of these premises to Messrs. E. and J. C. Mappin for a term of fifty years from that date at the rent of 500*l*. This underlease, together with the goodwill of the business of the Messrs. Mappin, was now vested in the plaintiff.

Leases of Nos. 218 and 222, Regent Street, in the same form as the lease of No. 220, had been granted by the Commissioners in 1822.

It appeared from the minutes of the Commissioners that the part of Regent Street in which the premises in question in this action were situate was not staked out until some months after the date of the agreement of 1820, but that the street, or at all events this part of it, was completed and named before the date of the lease of 1823; it also appeared that the sewer under Regent Street was made before 1820.

The defendant company denied that any part of the soil of the street passed to the plaintiff, and alleged that it was vested in the Crown.

The Attorney-General was added as a defendant for the purpose of having this question determined. This was the trial of the action.

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Hughes, *K.C.*, and *Dighton Pollock*, for the plaintiff. The question is whether the lease of 1823 carried with it the soil of half of the street in front of No. 220, subject of course to the rights of the highway authority. The presumption is that any man in possession of a plot of land adjoining a highway is in possession of the soil of the highway usque ad medium filum: *Doe* v. *Pearsey* (1); *London and North Western Ry. Co.* v. *Westminster Corporation*. (2) The rule applies equally whether the party occupying the adjoining land is a freeholder, leaseholder, or copyholder: per Holroyd J. in *Doe* v. *Pearsey* (1); it applies although the property is described by measurement and colour on a plan annexed to the conveyance, and although it is said to be bounded by the road: *Micklethwait* v. *Newlay Bridge Co.* (3); *Berridge* v. *Ward* (4); it applies to a grant from the Crown: *Lord* v. *Commissioners for the City of Sydney* (5); and it applies to streets in towns: *In re White's Charities*. (6) That the rule applies to leases was expressly decided by North J. in *Haynes* v. *King*. (7) *Leigh* v. *Jack* (8) may be relied on by the defendants; but that case is distinguishable because that was the case of an intended street which was never in fact made. Moreover, the observations of Cockburn C.J. in that case are inconsistent with *Micklethwait* v. *Newlay Bridge Co.* (3) In *Marquis of Salisbury* v. *Great Northern Ry. Co.* (9), the land which was conveyed was described by reference to a number on a plan, and the road was marked on the plan by a different number, and it was obvious that the presumption did not arise. *Beckett* v. *Leeds Corporation* (10) merely shews that the presumption may be rebutted by evidence of the surrounding circumstances. It is for the defendants to shew either that the presumption does not apply or that it is rebutted by the surrounding circumstances.

Younger, *K.C.*, *G. Cave*, and *Luxmoore*, for the defendants Liberty & Co. The presumption is rebutted by the terms of

(1) (1827) 7 B. & C. 304; 31 R. R. 209.
(2) [1902] 1 Ch. 269.
(3) (1886) 33 Ch. D. 133, 145.
(4) (1861) 10 C. B. (N.S.) 400, 415.
(5) (1859) 12 Moo. P. C. 473.
(6) [1898] 1 Ch. 659, 664.
(7) [1893] 3 Ch. 439.
(8) (1879) 5 Ex. D. 264.
(9) (1858) 5 C. B. (N.S.) 174.
(10) (1872) L. R. 7 Ch. 421.

the Act of 1813, by the terms of the lease, and by the surrounding circumstances. Under the Act of 1813 the Commissioners had power only to lease property not wanted for the purposes of the Act; but, apart from the question whether they had power to lease the street itself, the duties which they were required to discharge over this street when laid out rendered it imperative that they should retain the ownership of the soil, and in that case the presumption is rebutted: *Micklethwait* v. *Newlay Bridge Co.* (1), per Cotton L.J.

Further, the lease described the property abutting on a street "now forming," and it passed nothing which was not contained in the agreement of 1820, at which date this part of Regent Street was not staked out. That brings this case within the principle of *Leigh* v. *Jack*. (2) There is enough on the face of the lease to shew that the street was not intended to pass: *Plumstead Board of Works* v. *British Land Co.* (3) That case was reversed upon appeal (4), but upon another point. The circumstances under which the lease was executed are to be considered: *Duke of Devonshire* v. *Pattinson* (5); and the fact that the lease included vaults which were partly in front of No. 222 goes a long way to rebut the presumption. For if the presumption applies, it applies equally to No. 220 and No. 222; but the lease of No. 220 was granted after the lease of No. 222. Therefore, on the plaintiff's hypothesis, the Crown must have granted by the lease of No. 220 something which it had already granted by the lease of No. 222. That tends to shew that all that passed under the lease of No. 220 was the actual property delineated in the plan on the lease with the addition of the vaults which were included in the general words. *Pryor* v. *Petre* (6) shews that the mode of description in the conveyance, though not conclusive of itself, is a circumstance to be taken into account in determining whether this presumption is rebutted.

Further, it is doubtful whether the presumption applies to a lease. The only case in which it has been held to apply is

(1) 33 Ch. D. 147.
(2) 5 Ex. D. 264.
(3) (1874) L. R. 10 Q. B. 16.
(4) (1875) L. R. 10 Q. B. 203.
(5) (1887) 20 Q. B. D. 263, 273.
(6) [1894] 2 Ch. 11, 15.

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Haynes v. *King* (1), and there the question was not necessary to the decision of the case, and it was not fully argued. In *Landrock* v. *Metropolitan District Ry. Co.* (2) Lord Esher M.R. expressed a doubt upon this point. In *Squire* v. *Campbell* (3), which was a decision upon the very Act in question in this case, it was never suggested that the soil of the street was vested in the owners of the adjoining houses.

Further, this presumption does not apply to a grant of Crown property, for the King's grant is taken most strongly in favour of the King and against the grantee: Elphinstone's Interpretation of Deeds, p. 99; Viner's Abridgement, "Prerogative of the King" (O. c. 2) 6; *Alton Woods' Case.* (4)

Sir E. Carson, S.-G., and *Vaughan Hawkins*, for the Crown. This presumption as to the ownership of the road does not apply to the letting of a small portion of a large property vested in a public authority for the purpose of carrying out a public scheme, with obligations incidental to that public purpose, where the making of the road is part of the scheme. The rule that a conveyance of land to which belongs a moiety of an adjoining highway passes the moiety of the highway by the general description of the piece of land owes its origin to this: that, although the grantor had given up the user of the road, he had not segregated the road from the adjoining property. If that is the true origin, the rule would not apply even if this were a case of a private owner laying out a building estate, because in that case he segregates the road for the general purposes of the estate, and does not intend to convey a portion of the road to the persons on each side of the street. As was said by Cotton L.J. in *Leigh* v. *Jack* (5), it is "very questionable whether the presumption can ever be held to extend to those cases, where land is sold in plots for building purposes, even although the roads have been actually laid out": and see *Beckett* v. *Leeds Corporation.* (6) A fortiori it cannot apply to a sale in lots of land vested in a public body for public

(1) [1893] 3 Ch. 439.
(2) (1886) 3 Times L. R. 162.
(3) (1836) 1 My. & Cr. 459; 43 R. R. 231.
(4) (1594) 1 Rep. 46 b.
(5) 5 Ex. D. 264, 274.
(6) L. R. 7 Ch. 421, 424.

purposes. In the case of *The Rebeckah* (1) Sir William Scott lays down the rule that grants from the Crown are to be strictly construed as against the grantee, and the reason which he gives for the rule is that the prerogatives of the Crown being conferred upon it for public use, such prerogatives ought not to be diminished by any grant beyond what such grant by necessary and unavoidable construction shall take away. In *Rex* v. *Inhabitants of Hatfield* (2) Lord Denman thought that no presumption could arise as to the ownership of soil in a road where the road was defined for the first time under a newly created authority. In *Micklethwait* v. *Newlay Bridge Co.* (3) and *Lord* v. *Commissioners for the City of Sydney* (4) the decision proceeded upon the view that there was no reason why the property should be reserved by the grantor, since it might be immediately useful to the grantee and could scarcely be of any use to the grantor; but this is exactly the converse case. *In re White's Charities* (5), as your Lordship observed in *London and North Western Ry. Co.* v. *Westminster Corporation* (6), is not a wholly satisfactory case, but it was merely a decision upon the evidence that the circumstances in that case did not tend to negative the presumption. This case is indistinguishable from *Leigh* v. *Jack*. (7)

Further, the Commissioners, under s. 34 of the Act of 1813, had no power to lease any streets or places. That section draws a distinction between "houses, buildings, lands, tenements, and hereditaments" on the one hand, and "streets and places" on the other.

Hughes, K.C., in reply. This street was in use at any rate before the date of the lease, and, if it is material, the date of the lease, and not the date of the agreement, is the time for ascertaining whether the presumption applies. This was a completed, not an intended street, and therefore *Leigh* v. *Jack* (7) is distinguishable. The description in the lease of the street as "now forming" is misleading. The Acts of 1813 and

(1) (1799) 1 Rob. Adm. 227, 230.
(2) (1835) 4 Ad. & E. 156; 43 R. R. 322.
(3) 33 Ch. D. 133.
(4) 12 Moo. P. C. 473.
(5) [1898] 1 Ch. 659.
(6) [1902] 1 Ch. 269.
(7) 5 Ex. D. 264.

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1816 do not require that the Commissioners of Woods and Forests or the paving commissioners should retain the subsoil of the street, and there is no special ground for saying that this presumption does not apply against a highway authority or other public body, since it can exercise its powers without the ownership of the subsoil: *Tunbridge Wells Corporation* v. *Baird*. (1) Applying the test laid down by Cotton L.J. in *Micklethwait* v. *Newlay Bridge Co.* (2), and by Bramwell L.J. in *Leigh* v. *Jack* (3), there is here no material circumstance known to both parties to rebut the presumption, and the existence of the vaults is a material circumstance in support of it. The more reasonable view is that these were included in the lease because it carried with it the soil of the street usque ad medium filum. This presumption ought not to be frittered away by fine distinctions, because all conveyances are made upon the footing of its existence.

Upon the question whether the presumption applies to leaseholds, *Dwyer* v. *Rich* (4) is a direct decision by the Exchequer Chamber in Ireland that it does; and in *Tilbury* v. *Silva* (5) Kay J. says that it applies to land of any tenure, whether freehold, copyhold, or leasehold.

JOYCE J. I suppose there is a presumption where persons own the land by the side of a street that, in the absence of evidence or knowledge of what the real facts were, they must be taken to own the soil of the street usque ad medium filum. But, of course, that presumption is displaced, or rather cannot be held to apply, in a case where we have evidence and know all the facts as to the acquisition of the land. In the present case we have evidence, and we really know the history of what has taken place with reference to No. 220, Regent Street, and the neighbourhood. The presumption which I have mentioned really has no application. Here we have the history, we have the Act of Parliament and the deposited plan, and we have the minutes of the Commissioners. The plaintiff claims to be

(1) [1896] A. C. 434.
(2) 33 Ch. D. 145.
(3) 5 Ex. D. 271.
(4) (1871) Ir. R. 6 C. L. 144.
(5) (1890) 45 Ch. D. 98.

entitled to half the soil of Regent Street as it now stands under the lease of February 7, 1823, of No. 220, Regent Street. That lease mentions Regent Street as a street then forming and called, or intended to be called, Regent Street. Now, if any ordinary person—I mean not a lawyer—were to read through that lease from beginning to end, I am sure it would never occur to him that that lease passed the ownership in any part of the soil of any part of Regent Street when he saw how the parcels were described. The contention of the plaintiff can only be supported by recourse to another presumption of law which is thus stated in Elphinstone's Interpretation of Deeds, p. 179: "By the conveyance of land abutting on a highway, ... the primâ facie presumption of law, in the absence of evidence of ownership, is that . . . . the soil of the road usque ad medium filum passes." Then *Beckett* v. *Leeds Corporation* (1) is cited, and there are various illustrations of and exceptions to that rule mentioned in the following pages. In particular, I observe that Blackburn J., in his judgment in *Plumstead Board of Works* v. *British Land Co.* (2), says that it has always been held enough to rebut the presumption where there was anything to shew that it was not the intention to convey any part of the road.

The lease, as I mentioned, speaks of Regent Street as "now forming"; but the contract for the lease was made some two years or so previously, and, as at present advised, I am of opinion that it is the date of the contract that must be referred to for the purpose of settling the rights of the parties with reference to this point, and not the date of the conveyance. For that I refer to the analogous case before the Court of Appeal of *Broomfield* v. *Williams* (3), and especially to the judgment of Rigby L.J. But one thing is clear, that this presumption may be rebutted by evidence of surrounding circumstances which lead to the inference that no part of the soil of the highway was intended to pass. As has been mentioned in the course of the argument, doubts have been expressed by various judges as to whether the presumption

(1) L. R. 7 Ch. 421. (2) L. R. 10 Q. B. 24.
(3) [1897] 1 Ch. 602, 616.

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ever applies to houses in a town and as to whether it applies to a building estate: see per Cotton L.J. in *Leigh* v. *Jack*. (1) The reason for the presumption is said to be founded on a supposition which is variously stated. In *Doe* v. *Pearsey* (2) Bayley J. says: "The rule is founded on a supposition, that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure and the middle of the road." But none of the suppositions upon which the reason is founded is consistent with the facts of this case.

Upon a perusal of the Act and of the map, I am of opinion that the site of the moiety of Regent Street next to No. 220 was land wanted for the purposes of the Act. If I am right in that, s. 34 does not confer upon the Commissioners any power to sell that particular land. Upon the construction of the section, I very much doubt whether there was power to demise it. I agree there is a difficulty as to that; but, looking at the terms of the section, and looking also at the language and at the object of the Act, I very much doubt whether the Commissioners had power to demise anything that was wanted for the purposes of the Act. But whether that be so or not, I am of opinion that there was not one single reason for their leasing this subsoil, particularly having regard to the provisions of the Act with reference to the road and to the circumstances of the case, while, on the other hand, to my mind, there were a thousand and one reasons against their doing anything of the kind. The very least that could be said, in my opinion, is that in the present case it would have been a very ill-advised thing to do, if, indeed, it would not have been improper and possibly illegal to demise the subsoil of the adjacent street.

In the view which I take, it is not necessary for me to decide whether a lease stands upon the same footing as a grant, nor whether a grant or lease from the Crown stands upon any other footing than a grant or lease by a private person. I think that in the circumstances it is in the highest degree improbable that it should ever have been intended to demise or part with the site of the portion of the subsoil of

(1) 5 Ex. D. 264. (2) 7 B. & C. 304, 306; 31 R. R. 209.

Regent Street which the plaintiff claims. In short, if ever there was a case where it was to be inferred from the surrounding circumstances that it was not intended to pass the site of the moiety of the adjacent street, when the parcels in the demise are described as they are here by dimensions and by map, in my opinion, this is the case.

The result is that, if I am right, no part of the subsoil of what is now Regent Street was intended to be included or is comprised in the demise made by the lease of February 7, 1823, and there must be a declaration to that effect.

Solicitors: *Lumley & Lumley; Rose-Innes, Son & Crick; Solicitor to the Office of Woods and Forests.*

H. B. H.

In re JUMP. GALLOWAY *v.* HOPE.

[1902 J. 771.]

Power—Duration—Determination—Absolute Vesting of Estate—Incapacity of Person entitled.

The question of the duration of a power in a settlement is, if the rule against perpetuities is not infringed, one of intention. A power of sale given by a will to trustees to enable them to perform a trust for the maintenance, out of capital as well as income, of a lunatic during his life, is not determined by the lunatic's becoming absolutely entitled to the property so long as he is unable to call for a conveyance.

THE testator in this action by his will, dated February 24, 1842, devised and bequeathed all his real and personal estate to his executors therein named upon trust for his daughter Jane Eden for her life, and after her decease upon trust, in their discretion and of their uncontrollable authority, to manage and administer his said estate and effects, and to pay, apply, and expend the same, or so much thereof as they should think expedient, to or for the clothing, board, lodging, maintenance, and support or otherwise for the personal and peculiar benefit of his grandchildren (notwithstanding the competency of their

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parent) during their lives and the life of the survivor, whether infant or adult, and whether competent or incompetent to give an acquittance or discharge, at such time or times and in such proportions and manner in all respects as his said executors should think most conducive to their comfort and convenience; and on the decease of the survivor of his said grandchildren upon trust to convey, transfer, pay, and divide what might be then left (if anything) of his estates and effects unto the issue of such grandchildren and their heirs equally, share and share alike and as tenants in common. And the testator empowered his trustees at any time after his decease, and when they in their own discretion should consider necessary, to sell and convert his estate and effects into money.

The testator died on March 5, 1842. He had only one child, Jane Eden, the daughter mentioned in the will. She died in 1846 having had three children, one of whom died in infancy in the testator's lifetime; two, Robert Eden and Jane Eden, both of whom were born in the testator's lifetime, survived her. Robert Eden was of unsound mind; Jane Eden, the granddaughter, died a spinster and intestate on December 12, 1882. Robert Eden, the grandson, died on January 28, 1902, a bachelor and intestate. New trustees of the will were from time to time appointed, and they had in exercise of the power in the will sold part of the testator's real estate before, and other part after, the death of Jane Eden, the granddaughter, during the life of Robert Eden, the grandson.

This summons was taken out by the trustees of the testator's will for the determination of the question whether at the death of Robert Eden the investments representing the real estate sold at the times aforesaid respectively belonged to the estate of Robert Eden, and, if so, whether as real or personal estate. The original defendants were the legal personal representatives of Robert Eden and the official solicitor.

On May 10, 1902, an order was made on the summons declaring that, according to the true construction of the will, the proceeds of sale of such part of the testator's real estate as was sold before the death of Jane Eden belonged to the estate of Robert Eden as personal estate; an inquiry was directed who was

Robert Eden's heir-at-law, and further consideration was adjourned.

In answer to this inquiry, it was certified that Robert Eden's heir-at-law was John Thomas Hope, who had since died, and his widow Mary Hope was his executrix and entitled under his will to his real and personal estate.

All proceedings were then stayed against the official solicitor, and Mary Hope was served with notice of the judgment.

The case now came on for further consideration.

Mather, for the plaintiffs, the trustees of the will.

Micklem, *K.C.*, and *Cann*, for the legal personal representative of Robert Eden. The power of sale continued to exist during the life of the grandson Robert Eden. The sales after the death of his sister Jane Eden were properly made in exercise of the power and effected a conversion. The proceeds of sale, therefore, are part of Robert Eden's personal estate. *Lantsbery* v. *Collier* (1) shews that the Court must look at the intention of the testator as expressed by the whole of the instrument. *In re Cotton's Trustees and School Board for London* (2) and *In re Lord Sudeley and Baines & Co.* (3) are authorities that a power of sale will not be determined by the vesting of an absolute interest under a settlement, whether made by deed or will, if it was the intention of the settlor that the power should continue.

Eve, *K.C.*, and *Methold*, for the heir-at-law. The general rule is that a power is absolutely extinguished when all the purposes for which it was originally created have ceased to exist: Farwell on Powers, 2nd ed. p. 32; *Wheate* v. *Hall.* (4) *Wolley* v. *Jenkins* (5) shews that the purposes are exhausted when, as in this case, a life estate coalesces with an absolute reversion in fee. The only exception is that the power of sale may be exercised within a reasonable time after the property has absolutely vested, if it is necessary to sell for the purpose of division: *Peters* v. *Lewes and East Grinstead Ry. Co.* (6)

(1) (1856) 2 K. & J. 709.
(2) (1882) 19 Ch. D. 624.
(3) [1894] 1 Ch. 334.
(4) (1809) 17 Ves. 80.
(5) (1856) 23 Beav. 53; affirmed 5 W. R. 281.
(6) (1881) 18 Ch. D. 429.

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That exception covers the cases cited on the other side, but it does not apply here. *Saunders* v. *Vautier* (1) shews that directions given by the testator for maintenance and accumulation after twenty-one will not prevent an absolute vesting of the property at that age.

SWINFEN EADY J. The question I have to determine in the present case is whether the power of sale was subsisting when it purported to be exercised. It is contended that on the death of Jane Eden, the granddaughter, on December 12, 1882, the only object of the trust was Robert Eden, the grandson, and that any interest which he took under the will during his life became merged in the remainder, which then devolved upon him as heir-at-law of the testator. Upon the construction of the will, I am of opinion that the remainder after the trust for the grandchildren during their lives failed and was invalid, and in fact that has not been seriously disputed. The real contention has been whether the power of sale was not absolutely at an end on the death of Jane Eden, the granddaughter. With regard to property sold previous to that date, an order has already been made, and no question arises. The only question now remaining is with regard to property sold after that date, but during the life of Robert Eden. [His Lordship read the trust of the will in favour of grandchildren, and continued:—] Then, as the trust over was to divide what, if anything, might be left, it is clear that the trust in favour of the grandchildren was to be both of capital and income.

It appears from the evidence that Robert Eden was a person of weak mind unable to protect himself, and so continued during his whole life. Under those circumstances it could not be disputed that the trust to clothe, board, lodge, maintain, and support him was applicable during the whole of his life. It has not been contended that he was ever in a position, or in a mental condition, to intervene after the death of his sister and call for a conveyance of the trust property to himself.

Now, what is the first test I have to apply in considering this question? Did the testator intend that this power of

(1) (1841) Cr. & Ph. 240; 54 R. R. 286.

maintenance, put shortly, of his grandson should continue during the whole of the grandson's life? The power of sale is express and is given by the testator to his trustees at any time after his death, and when they in their own discretion shall consider necessary.

I approach the subject from the same point of view that Fry J. did in *In re Cotton's Trustees and School Board for London.* (1) He says (2): "Before proceeding to consider that argument" (namely, that existing powers came to an end when the absolute interest vested in persons who were sui juris), "I must observe that there is the greatest possible distinction between the determination of a power under the instrument which created it, and its extinction by the concurrence of the persons who are entitled to take the property which is the subject of the power. The former appears to me, subject to the question of the power going beyond the period allowed by law for the duration of such powers, to be a mere question of the intention of the donor of the power, as evidenced by the instrument by which the power was created." Then, after dealing with the facts of the case, he says: "Nothing can be more plain, to my mind, than the intention of the testator that, during the period to which I referred, the estate and the fund should be managed together by the trustees as a common concern, in order to utilize and improve the estate. That was his intention, and it would be a violation of his intention if I were to hold that it had come to an end by the absolute vesting of the beneficial shares. Nothing could be more inconvenient than for persons entitled to undivided eighths to have the management and carrying on of a concern of this kind. The case is very similar to that which would have occurred if the testator, being the owner of a business and land connected with it, had vested the business in trustees for the purpose of their carrying it on during the same period. It would be very difficult in such a case to say that the intention of the testator was that the power should come to an end when the beneficial interests in the business had become absolutely vested. The question, therefore, in my judgment, being merely one of intention, I

(1) 19 Ch. D. 624. (2) 19 Ch. D. 626, 629.

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conclude that the intention of this testator was that this enterprise should be carried on during that period which he has indicated. It has not been suggested that that period transgresses the law against perpetuities, and, therefore, it is valid. I am not deciding that the person beneficially interested might not at any moment put an end to the power and the trusts connected with the term; but there is no suggestion that they have yet done so."

That case was followed by Chitty J. in *In re Lord Sudeley and Baines & Co.* (1) I have, therefore, to consider whether it was the intention of the testator that this trust should continue during the whole of the life of Robert Eden. I am of opinion that it was. It is a case of a provision being made for the maintenance and support of a person unable to maintain and support himself; and I arrive at the conclusion that the intention of the testator was that that trust should continue, and that it did in fact continue, during the whole of the life of that person. It did not come to an end when by reason of the death of his mother and sister he became the sole beneficiary under the will. This view is not, in my judgment, inconsistent at all with the various authorities which have been cited. Where the property is vested in a person in possession he is entitled to call for a conveyance, and when he has done so the trusts ipso facto come to an end. Robert Eden was never in a position to call for a conveyance; and I should not be giving effect to but defeating the intention of the testator if I were to say that this trust came to an end, or the power of the trustees to exercise it, or to sell the property, came to an end, during the lifetime of Robert Eden, and when for his benefit it was necessary to exercise it, because by the death of other persons he had also become entitled to the property in remainder.

For these reasons I come to the conclusion that the power was well exercised, and the property must devolve accordingly.

Solicitors for plaintiffs: *Collins, Robinson & Driffield, Liverpool.*

Solicitor for all defendants: *Stanley J. Attenborough.*

(1) [1894] 1 Ch. 334.

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Nov. 5.

In re STEEL. WAPPETT *v.* ROBINSON.

[1902 S. 2232.]

Will—Mistake—Misdescription of Gift—"My Freehold Land and Hereditaments at M."—Customary Freeholds.

The word "freehold" may refer either to the quality or to the tenure of an estate.

Devise of "my freehold land and hereditaments at M.," in Westmorland:—

Held, to pass not only freeholds, but also privileged copyholds, on the ground that the latter were known as "freeholds" or "customary freeholds" in the locality, and the testatrix was unaware of any distinction of tenure.

ORIGINATING SUMMONS.

By her will dated September 22, 1899, the testatrix, after appointing the plaintiffs to be executors and trustees of her will, and bequeathing certain legacies, devised "my freehold land and hereditaments at Morland Field, in the said parish of Morland," unto and to the use of the defendant and her heirs, with a substitutionary gift to other persons in the event of the defendant predeceasing her. And the testatrix devised and bequeathed the residue of her real and personal estate to her trustees on trust for sale and conversion, the proceeds to be held on the trusts therein declared.

The testatrix died on January 29, 1902.

It appeared that in 1886 she had inherited four fields adjoining one another at Morland Field, in Morland, Westmorland, from her brother, who died intestate. Two of these fields were of freehold tenure, but the other two, though commonly called customary freeholds, or simply freeholds, in the locality, were in fact privileged copyholds held of the lords of the manor of Morland at fixed customary rents of 1*s.* and 1*s.* 2*d.* respectively, with fixed fines on death or alienation. They were conveyed by grant, surrender, and admittance, but were not held at the will of the lords. They were formerly described as held of the

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lords of the manor as "a tenant right estate of inheritance, parcel of the said manor."

The testatrix had never been admitted, or paid the customary rents, and it did not appear that she was aware of any distinction in the tenure of the four fields, which had for many years been let to the defendant at an entire rent of 12*l*. This summons was issued to determine whether the defendant was entitled to these customary freeholds.

Alfred Whitaker, for the plaintiffs. As there are fields to which the word "freehold" accurately applies, it cannot be extended to include these privileged copyholds, although they are commonly called customary freeholds: *Hardwick* v. *Hardwick* (1); *Arkell* v. *Fletcher* (2); *Stone* v. *Greening* (3); *Hall* v. *Fisher*. (4) In the case of *In re Bright-Smith* (5) a devise of "my freehold farm and lands situate at Edgware" was held to pass a copyhold portion of the farm, but there was no residuary devise as in this case, besides which the word "farm" could not be accurately applied to part of a farm.

Gatey, for the defendant. Although these customary freeholds are not of freehold tenure, they may be described as freehold land, the word "freehold" referring, not to the tenure, but to the estate of the tenant, as distinguished from a copyhold estate, which is held at the will of the lord. There is often some doubt as to the actual tenure of customary freeholds. For example, in *Wadmore* v. *Toller* (6), customary freeholds which formerly passed by surrender had for many years passed by conveyance. Again, the use of the expression "customary freehold," as applicable either to a privileged copyhold or to a freehold with customary incidents attached, is recognised by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-s. 4, which provides that "The expression 'real estate,' in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the

(1) (1873) L. R. 16 Eq. 168, 175.
(2) (1839) 10 Sim. 299; 51 R. R. 254.
(3) (1843) 13 Sim. 390.
(4) (1844) 1 Coll. 47.
(5) (1886) 31 Ch. D. 314.
(6) (1889) 6 Times L. R. 58.

title of a purchaser from the customary tenant." A devise of freehold land may, therefore, be construed to include customary freeholds of either description.

SWINFEN EADY J. The case is not free from doubt, but on the whole I am of opinion that the customary freeholds passed under the specific devise. [His Lordship stated the facts, and continued:—]

Although the testatrix was not only heiress-at-law but also customary heiress to her brother, it does not appear that she was aware of any distinction of tenure in the four fields she inherited, or that they had devolved on her in two different capacities. The fields in dispute are not strictly freeholds, but they are usually known as freeholds or customary freeholds in the locality, and in devising her "freehold land and hereditaments at Morland" the testatrix was not, I think, using the word "freehold" in the strict technical sense of tenure. I am of opinion that both the freeholds and the customary freeholds passed to the defendant.

Solicitors: *Christopher Johnson Brayshaw, for John Richardson, Appleby; Harrison & Powell, for Bell & Moordaff, Appleby.*

G. R. A.

Dictum of SWINFEN EADY, J., at p. 142, *applied*. *Re* DAVIDSON (*decd.*). [1949] 2 All E.R. 551.

Followed. *In re* DAVIDSON DECD. [1949] Ch. 670

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Oct. 28; *Nov.* 6.

In re COZENS. MILES *v.* WILSON.

[1902 C. 1904.]

Will—Class—"My own Nephews and Nieces"—Half-blood—Husband's Nephew described as "my Nephew"—Great-niece described as "my Niece."

The question whether a husband's nephew described in a will as "my nephew" and a great-niece described as "my niece" are entitled to share in a gift to "my own nephews and nieces" depends in every case on the particular will and the evidence, no hard and fast rule in the affirmative being laid down by *In re Jodrell*, (1890) 44 Ch. D. 590; [1891] A. C. 304, or in the negative by *Smith* v. *Lidiard*, (1857) 3 K. & J. 252, *Wells* v. *Wells*, (1874) L. R. 18 Eq. 504, or *Merrill* v. *Morton*, (1881) 17 Ch. D. 382.

Nephews and nieces of the half-blood are primâ facie entitled to share in such a gift.

Grieves v. *Rawley*, (1852) 10 Hare, 63, followed.

ORIGINATING SUMMONS.

By her will dated January 18, 1886, Catherine Cozens, having appointed the plaintiffs executors and trustees thereof, devised her twenty-two cottages in King's Lynn unto her trustees in trust for sale, and directed them to divide the net proceeds between "Mary Jane Cozens, Ellen Cozens, James Cozens, Louisa Howes, and Catherine Norriss, the nieces and nephews of my late husband George Cozens, and my nieces Emma Moore and Sarah Metcalf, the wife of Henry Metcalf, in equal shares."

The testatrix then gave (inter alia) the following legacies: "To my nephew William Moore the sum of twenty pounds, and to each of his children, with the exception of his daughter Emma Moore, the sum of twenty pounds each."

The testatrix then gave her temperance hotel in Blackfriars Road to her trustees upon trust to allow her manager Elizabeth Hall to carry on the business, so long as she remained single, under the supervision of the trustees, and to allow her to receive the profits of the business, "she paying thereout thirty shillings per week to my nephew Alexander Duncan,"

and after his decease to his wife for her life. And on the said Elizabeth Hall declining to carry on the said business, or at her decease, the testatrix directed the trustees to sell the temperance hotel.

And the testatrix gave the residue of her real and personal estate to her trustees upon trust for sale and realization, and directed them to stand possessed of the purchase-money of the temperance hotel and of the residue of the realization of her real and personal estate Upon trust as to one moiety for Elizabeth Hall. And as to the other moiety upon trust for Alexander Duncan for his life, and after his decease for his wife for her life, and after her decease "Upon trust to pay and divide the said moiety unto and among all my own nephews and nieces, with the exception of Mary Ann, the sister of William Moore, share and share alike."

By a codicil dated May 8, 1886, the testatrix revoked the bequests in favour of the wife of her "nephew Alexander Duncan."

The testatrix died on July 6, 1889.

Alexander Duncan, who was really a nephew of the testatrix's husband, died on May 4, 1900.

Elizabeth Hall died on November 11, 1901, having acted as manager of the temperance hotel until her death.

At the time of her decease the testatrix had nephews and nieces of the whole-blood and of the half-blood, great-nephews and great-nieces of the whole-blood and of the half-blood, and nephews and nieces of her husband, one of whom was Alexander Duncan.

Besides the nephews and nieces of the whole-blood, the following persons claimed to share in the gift to "my own nephews and nieces":—

First, nephews and nieces of the half-blood:

Secondly, Emma Moore, a great-niece, on the ground that she was described as a niece:

Thirdly, great-nephews and great-nieces generally, on the ground that one of their class had been described as a niece:

Fourthly, Sarah Metcalf, the daughter of an illegitimate nephew, on the ground that she was described as a niece.

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This summons was issued to determine who were the persons entitled to share.

The husband's nephews and nieces were not made parties, owing to the difficulty of tracing them.

A. M. Begg, for the trustees, stated the facts.

Clare, for nephews and nieces of the half-blood. The half-blood are entitled to share: *Cotton* v. *Scarancke* (1); *Grieves* v. *Rawley* (2); *In re Reed.* (3) The words "my own" are merely intended to exclude the husband's nephews and nieces.

T. T. Method, for Emma Moore and Sarah Metcalf. The testatrix has defined Emma Moore and Sarah Metcalf as nieces. They are, therefore, entitled to share: *In re Jodrell* (4), affirmed on appeal under the title *Seale-Hayne* v. *Jodrell* (5); *In re Parker* (6); *In re Walker.* (7)

In *In re Gue* (8) the Court of Appeal expressed a doubt whether *Smith* v. *Lidiard* (9) and *Wells* v. *Wells* (10) were not overruled by *In re Jodrell.* (4)

Harry Greenwood, for other great-nephews and great-nieces. Emma Moore, though a great-niece, must clearly be admitted: *In re Jodrell* (4); and if one member of a class is admitted, the whole class must be admitted: *Shelley* v. *Bryer* (11); *James* v. *Smith.* (12)

Henry Johnston, for nephews and nieces of the whole-blood. First, the words "my own" exclude the half-blood as well as the husband's nephews and nieces. Secondly, Emma Moore and Sarah Metcalf are only called "my nieces" to distinguish them from "the nephews and nieces of my late husband" mentioned in the same gift. A single misdescription of this kind cannot in itself and apart from the context enlarge the meaning of the word "niece" in another part of the will: *Smith* v. *Lidiard* (9); *Wells* v. *Wells* (10); *Merrill* v. *Morton* (13);

(1) (1815) 1 Madd. 45; 15 R. R. 208.
(2) 10 Hare, 63.
(3) (1888) 36 W. R. 682.
(4) 44 Ch. D. 590.
(5) [1891] A. C. 304.
(6) [1897] 2 Ch. 208.
(7) [1897] 2 Ch. 238.
(8) W. N. (1892) 132.
(9) 3 K. & J. 252.
(10) L. R. 18 Eq. 504.
(11) (1821) Jac. 207, 210; 23 R. R. 32.
(12) (1844) 14 Sim. 214.
(13) 17 Ch. D. 382.

Thompson v. *Robinson* (1); *In re Blower's Trusts.* (2) No rule to the contrary is laid down in *In re Jodrell* (3), where the gift was to "my relatives hereinbefore named," and great stress was laid on the words "hereinbefore named." Thirdly, if all great-nephews and great-nieces are admitted, parents and children would take together, and "it would be contrary to the authorities to interpret a term having an appropriate application to one class, as extending to two classes, comprising both parents and children": *Shelley* v. *Bryer.* (4)

In *In re Parker* (5) and *In re Walker* (6) certain illegitimate persons were described as if legitimate, but otherwise their relationship was correctly stated. It was held that they could share with the legitimate members of the class, the misdescription curing the illegitimacy. This is very different from admitting a whole class of persons of one degree of relationship to share in a gift to a class of another degree.

Cur. adv. vult.

Nov. 6. SWINFEN EADY J. The question raised by this summons is, Who are the persons entitled to share in a bequest made by Catherine Cozens by her will dated January 18, 1886, "unto and among all my own nephews and nieces"?

In the first place, as the words "nephews and nieces" mean primâ facie the children of brothers and sisters, including those of the half-blood—*Grieves* v. *Rawley* (7)—and as there is not anything in this will pointing to the exclusion of the half-blood, they are entitled to share.

Then the following persons claim to share: (*a*) Emma Moore, a child of a nephew of testatrix, because in another part of the will she is referred to as "my niece Emma Moore"; (*b*) great-nephews and great-nieces, being children of the nephews and nieces of testatrix, because Emma Moore, one of that class, is referred to in the will as "my niece"; (*c*) Sarah

(1) (1859) 27 Beav. 486.
(2) (1871) L. R. 6 Ch. 351, 353.
(3) 44 Ch. D. 590.
(4) Jac. 207, 210; 23 R. R. 32.
(5) [1897] 2 Ch. 208.
(6) [1897] 2 Ch. 238.
(7) 10 Hare, 63.

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Metcalf, the daughter of an illegitimate son of a sister of testatrix, because in another part of the will she is referred to as "my niece Sarah Metcalf."

It was contended on the one hand that the cases of *Smith* v. *Lidiard* (1), *Wells* v. *Wells* (2), and *Merrill* v. *Morton* (3) establish the proposition that the fact that a great-niece or a wife's niece has been previously called a niece will not enlarge the meaning of the word "niece" in another part of the will.

It was contended on the other hand that these cases were overruled by *In re Jodrell* (4), *Seale-Hayne* v. *Jodrell* (5)—see *In re Gue* (6)—and that the rule now is that where a legatee has once been referred to by an inaccurate description in a will, the same description in all other parts of the will must be treated as including that person, and all others in the same degree of relationship. In the case of *In re Jodrell* (4), in the Court of Appeal, Lord Halsbury repudiated entirely the notion of laying down any canon of construction which was to extend beyond the particular instrument that he was called upon to give an interpretation to. And in the House of Lords Lord Herschell said (7): "A word which is used commonly in the English language in several senses must be interpreted according to that which, having regard to the context and the whole of the provisions of the document which you have to construe, appears to be the sense in which the testator has used it." And in *In re Blower's Trusts* (8), where the question was whether a gift to nephews and nieces included great-nephews and great-nieces, James L.J. said: "But before we alter the meaning of words in obedience to a supposed indication of intention of the testator—before we deviate from the direct path in order to follow a light which appears to be held out by the testator—we must take care to be reasonably sure that it is a genuine light, and that we are not following the glare of a will-o'-the-wisp into a morass."

I am of opinion that both the propositions contended for

(1) 3 K. & J. 252.
(2) L. R. 18 Eq. 504.
(3) 17 Ch. D. 382.
(4) 44 Ch. D. 590.
(5) [1891] A. C. 304.
(6) W. N. (1892) 132.
(7) [1891] A. C. 306.
(8) L. R. 6 Ch. 351, 353.

were too widely stated. There is not any hard and fast rule that a gift to nieces does not include a great-niece, where in another part of the same will a great-niece is described as a niece; nor, on the other hand, is there any hard and fast rule that, whenever a great-niece has once been referred to in a will as a niece, the expression "niece" must in all other parts of the will be taken to include great-nieces.

The true rule is to determine by the language and context of each will, including the consideration of the whole instrument and any evidence properly admissible, the meaning of the expressions contained in it, and the persons who are entitled to share in the benefits thereby conferred.

Now, in the present case, the testatrix first gives the proceeds of sale of twenty-two cottages among certain named persons, the nieces and nephews of her late husband George Cozens, "and my nieces Emma Moore and Sarah Metcalf, the wife of Henry Metcalf."

Emma Moore was the daughter of William Moore, a nephew of testatrix; and Sarah Metcalf was the daughter of an illegitimate son of a sister of testatrix.

The testatrix then gives to her nephew William Moore the sum of 20*l.*, and to each of his children, with the exception of his daughter Emma Moore, the sum of 20*l.* each. Here the same Emma Moore is referred to again by her correct description—the daughter of a nephew—and not as a niece.

The testatrix then gives her hotel to trustees upon trust to allow her manager Elizabeth Hall to carry on the business so long as she shall remain single, "paying thereout thirty shillings per week to my nephew Alexander Duncan." Alexander Duncan was not the nephew of the testatrix, but the nephew of the husband of testatrix, and if the rule of construction contended for were to prevail, then Alexander Duncan, having been referred to in the will as "my nephew," and all other nephews of the husband, ought to be entitled to share in the gift in question.

The testatrix then gives one moiety of the proceeds of sale of her residuary estate, including the hotel on the death of her manager or on the manager declining to carry it on, as to one

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moiety upon trust for the said Alexander Duncan for life, and after his decease to his wife for life, and after the decease of Mrs. Duncan "upon trust to pay and divide the said moiety unto and among all my own nephews and nieces with the exception of Mary Ann, the sister of William Moore, share and share alike."

It was argued that the expression "my own" was used by the testatrix merely in order to exclude her husband's nephews and nieces, who might otherwise take; but I cannot adopt this view. In my opinion, the expression "my own nephews and nieces" in this will restricts the class to persons who are the lawful nephews or nieces of the testatrix, of the whole or half-blood, to the exclusion of great-nephews or great-nieces of the testatrix, nephews or nieces of her husband, a daughter of an illegitimate son of a sister of testatrix, and all other persons, though some of them may have been inaccurately referred to in some other part of the will as "my nephew" or "my niece." I make a declaration accordingly.

Solicitors: *Burton, Yeates & Hart, for Beloe & Beloe, King's Lynn; Andrew, Wood, Purves & Sutton, for Collin & Adams, Saffron Walden.*

G. R. A.

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[1901 M. 2378.]

1902

Nov. 11.

Costs—Taxation—Summons for Directions—Application for further Directions —Rules of Supreme Court, 1883, *Order xxx., r.* 5; *App. N, Item* 51.

The proper fees to be allowed on an ordinary application for further directions subsequent to a summons for directions are 1*s.* 6*d.* for the notice of application, 1*s.* for the copy for chambers, and 2*s.* 6*d.* for the copy and service on the other side, making a total of 5*s.*

The notice fee is covered by the Rules of the Supreme Court, 1883, App. N, item 51, which allows 1*s.* 6*d.* "for preparing any necessary or proper notice, not otherwise provided for," although Order xxx., r. 5, under which these applications are now made by a notice instead of a summons, was not in force when Appendix N was prepared.

SUMMONS to review taxation.

This action was commenced by writ dated July 30, 1901, and the usual summons for directions was issued on October 28, 1901.

The action was subsequently settled by leave of the Court on the terms (inter alia) that the defendant Constance should pay the plaintiffs' costs of and incidental to the action to be taxed as between solicitor and client, and an order to this effect was made on March 18, 1902.

On the taxation a question arose as to the proper amount to be allowed for two applications for further directions subsequent to the original summons for directions.

These applications were made by notice under Order xxx., r. 5, the first, dated January 7, 1902, being an application for discovery, and the second, dated February 19, 1902, an application for leave to compromise.

The plaintiffs' solicitors had charged for these applications as if they were summonses, on the ground that the work involved was the same as in the case of a summons under the former practice, although the form was changed by Order xxx., r. 5.

On the application for discovery they had charged 3*s.* for the notice of application, 2*s.* for the copy for chambers, and 3*s.* 6*d.*

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for the copy and service on the other side, making a total of 8*s*. 6*d*.

The taxing master considered that the notice was covered by the Rules of the Supreme Court, 1883, App. N, item 51, which allows 1*s*. 6*d*. "for preparing any necessary or proper notice, not otherwise provided for." He therefore allowed 1*s*. 6*d*. for the notice, 1*s*. for the copy for chambers, and 2*s*. 6*d*. for the copy and service, making a total of 5*s*.

On the application for leave to compromise, the charge for copy and service was inadvertently omitted from the bill, so that the allowance was only 2*s*. 6*d*.

The plaintiffs objected to the taxation, on the ground that the notices were in effect summonses, that item 51 was inapplicable to these notices, which now took the place of summonses under the former practice, and that as no new fee was provided they ought still to be charged as summonses.

The taxing master overruled the objections, stating that such notices were no new thing, but that similar notices under summonses to proceed had been for years and were still allowed at 4*s*. only, no copy for chambers being allowed; and that when the summons for directions was introduced the taxing masters fixed the charge for these notices and copy for chambers at 5*s*., that the allowance was quite enough, and apart from the practice he should not feel justified in allowing more. He also stated that the same objection was taken in *North Brancepeth Coal Co., Ld.* v. *Straker* (1), where Kekewich J. dismissed the summons to review.

It appeared that the 4*s*. referred to by the taxing master was made up by allowing 1*s*. 6*d*. for the notice, 1*s*. for the copy for service, and 1*s*. 6*d*. for the service.

The point being of general interest to solicitors, the plaintiffs took out this summons to review.

Borthwick, for the plaintiffs. Item 51, which allows 1*s*. 6*d*. "for preparing any necessary or proper notice, not otherwise provided for," was settled many years before Order XXX., r. 5, was passed. It was practically confined to ordinary notices,

(1) Unreported.

such as a notice of trial and other notices of the same nature mentioned in the Annual Practice, App. N, item 51, note, the majority of which could be drawn in a solicitor's office, and involved no attendance at chambers to fix an appointment. The present notices which replace the summonses of the former practice are in effect unstamped summonses. They require the same care in preparation as a summons, and an attendance to fix an appointment is necessary. Item 51 is confined to "preparing," and makes no allowance for the attendance.

[SWINFEN EADY J. On attending in chambers to obtain the appointment, a copy of the notice is left for the master. Does not the 1*s.* allowed for that copy include the attendance to leave it?]

That may be so; but, having regard to the skill and labour involved in the preparation of these notices, the framers of Order XXX., r. 5, cannot have intended to leave their costs to be fixed by item 51; and, as no new fee is fixed, the fees heretofore allowed for such work should still be allowed: Order LXV., r. 27 (30), (37).

Rolt, for the defendant Constance.

SWINFEN EADY J. In substance the question which arises upon this matter is whether an allowance of 5*s.* for a notice issued after the summons for directions, and a copy for chambers, and a copy and service on the other side, is a reasonable and proper allowance. I say "in substance," because an additional charge of 2*s.* 6*d.* could, I think, have been made for the second notice; but it was not included in the bill, so has not been allowed. I merely mention it in passing, but there is no point about it. It was not in the bill, and is not claimed.

There is nothing special with regard to this particular case. The application has been made to determine the matter on general principles, and although it may be that only one or two items in this particular bill are selected, and the amount involved is in this particular case very small, still the summons is taken out with the view of determining the proper charge

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to make in this and similar cases. I propose to consider it on that footing.

The ordinary practice has been followed in this particular case. A summons for directions was taken out, and then notices were given of appointments to deal with matters that arose incidentally. One of the notices in question was a notice of an application for an ordinary affidavit of documents, and the other was a notice with reference to the compromise and settlement of the action and matters in dispute. The point taken by the plaintiffs is this. A notice following upon a summons for directions under the new practice is not provided for by the Costs Rules in Appendix N, and, therefore, the old practice should be applied. Now, item 51 in Appendix N allows 1*s.* 6*d.* "for preparing any necessary or proper notice, not otherwise provided for." I am unable to appreciate why the notice in question is not within that item. True it is that notices of applications for further directions were not in force when this scale was prepared. These notices may have been rendered "necessary or proper" by the subsequent promulgation of Order xxx., r. 5. Nevertheless item 51 extends to any notices "not otherwise provided for" if "necessary or proper."

The master has certified that when the summons for directions was introduced the masters considered the matter, and fixed the charge for these notices, including the copy for chambers, at 5*s.* In my opinion, that is a fair and reasonable allowance for the work done. In some cases it may be a little high, and in some cases it may be quite insufficient; but if the notice is special, and necessarily exceeds three folios, the master makes an additional allowance under items 52 and 53; even if the notice should be special, but nevertheless brief, so as not to exceed three folios, the masters have a wide discretion, and may take that matter into consideration with regard to discretionary items, under Order LXV., r. 27 (38). This rule provides that "As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which

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any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances"; so that in taxing costs the master generally has a wide discretion. With regard to the usual charge that is proper to be allowed in all ordinary cases, I can only take the same view as the master that this charge of 5*s*., which it is the practice of the Taxing Office to allow, is a fair and reasonable and proper charge.

Summons dismissed with costs. Leave to appeal refused.

Solicitors: *King & Burrell; Flux, Thompson & Co.*

G. R. A.

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1902
Nov. 11, 12, 22.

In re FOTHERGILL'S ESTATE. PRICE-FOTHERGILL *v.* PRICE.

[1902 F. 1087.]

Will—Absolute Gift—Personalty—Trust for Person "entitled to the Possession or Receipt of the Rents" of Settled Estates—Actual Possession—Intention.

A testator bequeathed certain chattels to trustees upon trust to permit the same to be enjoyed by the person for the time being "in the actual possession or entitled to the receipt of the rents and profits" of real estates settled by his will.

He also bequeathed the proceeds of sale and conversion of his residuary real and personal estate to the trustees on trust to pay the income to the person for the time being "entitled to the possession or receipt of the rents" of the settled estates.

The words "entitled to the possession or receipt of the rents" or their equivalents were used in numerous other clauses of the will, in all of which they necessarily referred to actual possession, though not so expressed:—

Held, that a tenant in tail, who predeceased the life tenant, had, subject to her interest, become absolutely entitled to the residuary estate, but not to the chattels.

Foley v. *Burnell*, (1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319, *Martelli* v. *Holloway*, (1872) L. R. 5 H. L. 532, *Lord Scarsdale* v. *Curzon*, (1860) 1 J. & H. 40, and *In re Angerstein*, [1895] 2 Ch. 883, applied.

ORIGINATING SUMMONS.

By his will dated February 23, 1869, Rowland Fothergill

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devised the Hensol estate to trustees upon trust to pay an annuity which has since determined, and subject thereto upon trust for Mary Fothergill (since deceased) for life, and after her death for Ann Tarleton (since deceased) for life, and after her death for the present life tenant for her life, and after her death for her first and other sons successively according to seniority in tail, with divers remainders over.

And the testator declared that every person who should become "entitled to the possession or to the receipt of the rents and profits of the Hensol estate" should within the time therein mentioned take the name and arms of Fothergill, with a proviso for defeasance of their interest in the event of non-compliance.

And the testator declared that every person who should become "entitled to the possession or to the receipt of the rents and profits of the Hensol estate," and who should be above the age of twenty-one years, and every person who should marry any female who should be or become so entitled should make Hensol Castle their principal place of residence, with a proviso for defeasance of their interest in the event of non-compliance.

And the testator declared that every person who should for the time being be "in the possession or entitled to the receipt of the rents and profits of the Hensol estate" for an estate for his or her life or any less estate should keep Hensol Castle and the other premises in repair.

And the testator declared that no person who should for the time being be "in the possession of or entitled to the receipt of the rents and profits of the Hensol estate" for an estate for his or her life or any less estate (except Mary Fothergill) should cut timber unless for the purposes therein mentioned, with a proviso that during the time any such person as last aforesaid (except as aforesaid) should be "in possession or entitled to the receipt of the rents and profits of the Hensol estate" for such estate as aforesaid the trustees might cut timber liable to deteriorate.

And the testator empowered his trustees during the minority of any person "entitled to the possession or the receipt of the rents and profits of the Hensol estate" as tenant for life, or

for any less estate, or as tenant in tail by purchase, to receive the rents and profits of and manage the Hensol estate as therein mentioned.

And the testator bequeathed his pictures, prints, books, plate, linen, glass, china, furniture, and household goods and effects of every description (except consumable articles) which at his death should be in or about Hensol Castle to his trustees, upon trust to permit the same to go along with and be used and enjoyed so far as the rules of law and equity would permit by the person who under the limitations thereinbefore contained should for the time being be "in the actual possession or entitled to the receipt of the rents and profits of the Hensol estate" in the same manner as if they had been freeholds of inheritance and had been included in the devise of the Hensol estate thereinbefore contained.

And the testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion, and directed them to pay his funeral and testamentary expenses and debts and legacies out of the proceeds thereof, and to invest the surplus in the securities therein mentioned, or in the purchase of real estate in England or Wales, with power to vary the investments or to sell or exchange any real estate so purchased for other real estate in England or Wales.

The will then proceeded as follows: "And I declare that the said trustees or trustee shall pay and apply the interest, dividends, rents, profits, and annual income of my residuary estate to or for the benefit of the person who for the time being shall under and by virtue of this my will be entitled to the possession or receipt of the rents of the Hensol estate, and shall otherwise hold my residuary estate upon such trusts that the annual income thereof shall, as far as possible, be enjoyed in like manner as if it had formed part of the rents and profits of the Hensol estate, it being my wish that the income of my residuary estate shall assist in keeping up and be in augmentation of the rents and profits of the Hensol estate."

And the testator empowered every male life tenant of the Hensol estate, either before or after he should be "entitled to

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the possession or to the receipt of the rents and profits of the Hensol estate," to jointure a wife as therein mentioned.

And the testator empowered any female life tenant of the Hensol estate, either before or after she should be "entitled to the possession or to the receipt of the rents and profits of the Hensol estate," with the consent in writing of the trustees, to appoint an annuity to a surviving husband as therein mentioned.

And the testator empowered the trustees, with the consent in writing of the person for the time being "entitled to the possession or the receipt of the rents and profits of the Hensol estate," if of full age, and if not at their own discretion, to lease the Hensol estate or other real estate as therein mentioned.

By a codicil dated April 15, 1869, the testator bequeathed 70,000*l.* to his trustees to be held by them upon the trusts declared in his will with regard to his residuary estate, such sum of 70,000*l.* to be considered the first charge by way of legacy on his residuary estate and to be treated as payable on the day of his death.

The testator died on September 19, 1871.

The present life tenant, whose husband died on April 16, 1899, had three sons and no daughters.

The first son, the late tenant in tail, who attained twenty-one on July 26, 1899, died a bachelor and intestate on June 9, 1901, without having executed any disentailing assurance, and letters of administration to his estate were granted to the life tenant on April 23, 1902.

The second son, the present tenant in tail, attained twenty-one on June 29, 1901.

The third son was still an infant.

This summons was issued to determine whether the late tenant in tail became absolutely entitled subject to the life tenant's interest to (*a*) the chattels at Hensol Castle, and (*b*) the trust funds representing the 70,000*l.* legacy and the residuary estate, or who was or would become entitled to the same.

Borthwick, for the life tenant and the third son. As the enjoyment of the chattels is expressly confined to the person in the "actual possession" of the Hensol estate, I cannot contend

that the late tenant in tail became entitled to them: *Lord Scarsdale* v. *Curzon* (1); *In re Angerstein* (2); Theobald on Wills, 5th ed. p. 631. But the gift of the income of the residue is not so confined, and as the income is given in perpetuity on the trust of the Hensol estate, the corpus vested absolutely in the late tenant in tail at birth: *Foley* v. *Burnell* (3); *Martelli* v. *Holloway* (4); *In re Hill.* (5)

Hewitt, for the present tenant in tail. A tenant in tail not coming into possession may be excluded by implication, although the words "actual possession" are not used: *Potts* v. *Potts.* (6) In *Cox* v. *Sutton* (7), which is somewhat like the present case, Wood V.-C. held that personalty settled as a repairing fund to be applied at the request and for the benefit of the persons entitled in possession to the real estate did not vest in a tenant in tail who died before coming into possession. In the present case the testator expresses his wish that the income of his residuary estate "shall assist in keeping up . . . . the Hensol estate."

Again, the words "entitled to the possession or receipt of the rents of the Hensol estate" primâ facie refer to actual possession. These words or their equivalents are used in the name and arms clause, the residence clause, the repairing clause, the leasing clause, and numerous other clauses, in every one of which the words necessarily refer to actual possession, though not so expressed, and the trust of the residue should be construed in the same way. In *Foley* v. *Burnell* (3), as was pointed out by Sugden L.C. in *Potts* v. *Potts* (8), the word "possession" could hardly be read strictly, as there was a term of 101 years prior to the limitation to the issue, besides which there was a clear intent to annex the chattels to the real estate as "heirlooms." In *Martelli* v. *Holloway* (4) the point became academic, as the life tenant died before the appeal was heard. In neither of these cases was the word "possession" coupled with the words "receipt of the rents."

(1) 1 J. & H. 40.
(2) [1895] 2 Ch. 883.
(3) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(4) L. R. 5 H. L. 532.
(5) [1902] 1 Ch. 537, 807.
(6) (1846) 3 J. & Lat. 353; affirmed (1848) 1 H. L. C. 671.
(7) (1856) 25 L. J. (Ch.) 845.
(8) 3 J. & Lat. 369.

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The latter words point strongly to actual possession, and not merely to a vested estate. (1)

Frederic Thompson, for the present trustee.

Borthwick, in reply.

Cur. adv. vult.

Nov. 22. SWINFEN EADY J. The first question raised by this originating summons is whether the pictures, prints, and other chattels at Hensol Castle, specifically bequeathed to go along with the Hensol estate, vested absolutely in the late tenant in tail subject to his mother's interest therein; or whether the present tenant in tail will become entitled to the same, if he shall survive his mother.

This point depends upon the proper construction to be placed upon the will of the late Rowland Fothergill. The testator bequeathed the articles in question to trustees upon trust to permit the same to go along with and be used and enjoyed, so far as the rules of law and equity would permit, by the person who under the limitations thereinbefore contained should for the time being be in the actual possession or entitled to the receipt of the rents and profits of the Hensol estate, in the same manner as if they had been freeholds of inheritance, and had been included in the devise of the Hensol estate therein contained.

Counsel for the legal personal representative of the late tenant in tail and the third son stated that, having regard to the expression "actual possession" contained in the will, he could not distinguish the present case from *Lord Scarsdale* v. *Curzon* (2) and *In re Angerstein* (3), and that as the late tenant in tail died in his mother's lifetime, and without ever having come into the actual possession of the estate, he could not contend that the specific chattels had become absolutely vested in him.

The other question raised by the summons is whether the trust funds representing the legacy of 70,000*l.* given by the first codicil and the residuary estate of the testator vested

(1) See vide *In re Johnson's Trusts*, (1866) L. R. 2 Eq. 716.

(2) 1 J. & H. 40.

(3) [1895] 2 Ch. 883.

absolutely, in the events which have happened, in the late tenant in tail. This depends upon the proper construction to be placed upon another portion of the will of the same testator.

The testator gave his residuary real and personal estate to trustees upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses and debts, and to invest the surplus in certain securities or in the purchase of real estate in England or Wales, with power to vary the investments, and to sell or exchange any real estate so purchased for other real estate in England or Wales. And the will then proceeded as follows: "And I declare that the said trustees or trustee shall pay and apply the interest, dividends, rents, profits, and annual income of my residuary estate to or for the benefit of the person who for the time being shall, under and by virtue of this my will, be entitled to the possession or receipt of the rents of the Hensol estate, and shall otherwise hold my residuary estate upon such trusts that the annual income thereof shall as far as possible be enjoyed in like manner as if it had formed part of the rents and profits of the Hensol estate, it being my wish that the income of my residuary estate shall assist in keeping up and be in augmentation of the rents and profits of the Hensol estate."

By his first codicil the testator bequeathed to his trustees the sum of 70,000*l.* to be held by them upon the trusts declared by his will with regard to his residuary estate, such sum of 70,000*l.* to be considered the first charge by way of legacy on his residuary estate, and to be treated as payable on the day of his death.

The effect of these bequests is that the 70,000*l.* and the residuary estate are held upon the same trusts (as far as possible) as the Hensol estate; the income of the personal estate, including the rents of any real estate purchased, is to be applied as if it formed part of the rents and profits of the Hensol estate and to assist in keeping up and be in augmentation of the rents and profits of the Hensol estate; and this not for any definite or limited time, but in perpetuity.

The general rule is that a gift of personalty to the persons for the time being entitled to real estate, so far as the rules of law

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and equity permit, vests absolutely, not in a tenant for life of the real estate, but in the first tenant in tail at birth, whether he comes into possession or not: *Foley* v. *Burnell* (1); *Lord Scarsdale* v. *Curzon*. (2) In *Cox* v. *Sutton* (3) Wood V.-C. affirmed the general rule in the clearest terms, although in that case upon the special language of that will he was able to arrive (not without difficulty) at the conclusion that the personalty was given as a contingent gift to a person who should answer a particular description at a particular date. If there be a direction that the personalty is not to vest in a tenant in tail dying under twenty-one, this will prevent the personalty from vesting in a tenant in tail by purchase dying an infant: *Christie* v. *Gosling* (4); *Countess of Harrington* v. *Earl of Harrington* (5); *Martelli* v. *Holloway*. (6) And if the gift of personal estate be to the person actually seised at the death of the tenants for life, or to the person seised of the actual freehold, which is defined as freehold in possession, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded: *Potts* v. *Potts*. (7) In this case Sugden L.C. said: "But if a plain intention be expressed that no person shall take the chattels absolutely, who does not live to become entitled to the possession of the real estate, the Court must execute that intention."

Upon a careful consideration of the will and codicil, I am unable to find any such intention expressed in the case before me; and, as was said by Sugden L.C. in *Potts* v. *Potts* (8), "It is firmly settled that the Court will not introduce in such cases the restrictions which conveyancers know how to introduce with apt words."

The personal estate is given in the present case by reference to the real estate, the income of the personal estate being directed to go for an indefinite period with the rents of the real estate, and, in my opinion, the 70,000*l.* and residuary

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(2) 1 J. & H. 40.
(3) 25 L. J. (Ch.) 845.
(4) (1866) L. R. 1 H. L. 279.
(5) (1871) L. R. 5 H. L. 87.
(6) L. R. 5 H. L. 532.
(7) 3 J. & Lat. 368.
(8) 3 J. & Lat. 369.

personalty vested absolutely in the late tenant in tail, there not being contained in the will any sufficient direction to preclude such vesting, and to carry these interests to the next tenant in tail.

Indeed, the present case appears to me to be a stronger one, in favour of the first tenant in tail taking an absolute interest, than *Martelli* v. *Holloway*. (1) There the will contained a proviso that the personal estate should absolutely belong only to such persons, &c., as should first attain twenty-one and become entitled to an estate tail in possession in the real estate, and it was held that a person had become absolutely entitled to the personal estate, although he had only a vested estate tail in the real estate in remainder expectant on his father's life estate.

The answer to the second question will therefore be that the late tenant in tail became absolutely entitled to the legacy and residuary personalty subject to the life tenant's interest therein.

Solicitors: *Iliffe, Henley & Sweet; Field, Roscoe & Co.*

(1) L. R. 5 H. L. 532.

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BICKMORE *v.* DIMMER.

[1902 B. 2797.]

Landlord and Tenant—Breach of Lessee's Covenant—Mandatory Injunction—Covenant not to make any Alteration to Demised Premises without Consent of Lessor—Clock fixed to Outside of House.

The lease of a shop occupied by a jeweller and watchmaker contained a covenant by the lessee that he would not make or suffer to be made any alteration to the demised premises without the previous written consent of the lessor:—

Held, that some limitation must be placed on the words of the covenant, and that the erection of a large clock, affixed without the consent of the lessor to the exterior of the wall of the house by means of bolts driven into it, was not a breach of the covenant, and consequently that a mandatory injunction to compel the removal of the clock ought not to be granted.

Decision of Farwell J. reversed.

Per Vaughan Williams and Cozens-Hardy L.JJ.: The word "alteration" in the covenant must be limited to alterations which would affect the form or structure of the building.

Per Stirling L.J.: There must be excepted from the covenant, not only things absolutely essential to the carrying on of the business, but also things fixed to the premises for the purpose of carrying on the business in a reasonable, ordinary, and proper way.

Per Cozens-Hardy L.J.: If, after entering into such a covenant, the covenantor, notwithstanding notice of objection by the covenantee, deliberately commits a breach of it, a mandatory injunction ought to be granted, provided that there has been no laches on the part of the covenantee.

Appeal from a decision of Farwell J.

The action was brought by lessors to restrain an alleged breach of a covenant contained in the lease.

By a lease dated May 5, 1898, the plaintiffs, who were executors of a will, demised to Frederick Heath, a pianoforte manufacturer, the basements, ground floors, first floors, and the rooms numbered 11, 12, and 13 on the second floors of the premises known as Nos. 24 and 26, Sandon Buildings, Church Street, in Liverpool, for the term of twenty-one years from January 1, 1899, subject to the several leases of parts of the premises set out in a schedule thereto, at the yearly rent of

1650*l.*, and subject to the covenants therein contained. And the lessee thereby covenanted with the lessors (inter alia) that he would, within twelve months from the commencement of the term, expend the sum of 400*l.* at least "in alterations to the shop fronts on the ground floor of the said premises, and otherwise in such substantial improvements, internal structural alterations and decorations of the said premises, and in such manner as the surveyor of the lessors shall approve, such work to be executed under the supervision and to the satisfaction of such surveyor." And that he would at all times during the term repair, support, amend, cleanse, and keep the inside of the premises, and all such alterations and improvements as aforesaid, "in good substantial repair, order, and condition (damage by fire, storm, and tempest, and also damage caused by the bursting of water-pipes, or other inevitable accident in any part of Sandon Buildings other than the demised premises only excepted)." And the lessee further covenanted that he should not nor would "assign, set over, underlet, or otherwise dispose of or part with the possession of the demised premises, or any part thereof, or his estate or interest therein without the special licence and consent in writing of the lessors first had and obtained for that purpose, such consent, however, not to be arbitrarily withheld in case a responsible tenant or tenants be nominated." And the lessee further covenanted that he would not "make or suffer to be made any alteration to the said premises, except as herein expressly provided, without the consent in writing of the lessors first had and obtained."

The lease contained a proviso for re-entry by the lessors in case (inter alia) of the breach or non-performance of any of the covenants and agreements therein contained on the part of the lessee to be done, kept, or performed, whether negative, affirmative, or otherwise, or in case the lessee should assign, underlet, or part with the possession of the premises, or any part thereof, without such consent as aforesaid.

And the lessors covenanted with the lessee that they would within twelve months from the commencement of the term expend the sum of 700*l.*, or some part thereof, in improvements to the staircase and lift in the premises, in accordance with

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plans prepared by the lessors' architect and already approved, and, in case the whole of the sum of 700*l.* should not be required for that purpose, would apply the balance in or towards the execution of the alterations and improvements thereinbefore covenanted to be executed by the lessee, so as to relieve the lessee pro tanto from expending the whole of the sum of 400*l.* under the covenants, and also that the lessors would during the term keep in repair the roof, main walls, main timbers, and the outside of the demised premises.

On December 18, 1900, Heath assigned the demised premises to George Dimmer, the defendant, for the residue of the term. This assignment was made without the consent of the lessors, and on January 11, 1901, they commenced an action against Dimmer to recover possession of the premises on the ground of forfeiture.

On March 1, 1901, an agreement of compromise was entered into between the lessors and Dimmer, by which it was provided that the action should be discontinued, and Dimmer covenanted with the lessors that he, his executors, administrators or assigns, would not at any time thereafter during the continuance of the term carry on upon that portion of the premises which was erected on the land surrounded with a brown line on the plan attached to the lease, or any part of that land, the business of a jeweller, silversmith, watchmaker, or any like business, and would not advertise or indicate in any manner in, upon, or over any portion of the restricted premises any such business. And Dimmer also covenanted that he would thenceforth during the residue of the term pay the rent reserved by the lease, and observe and perform all the covenants and conditions therein contained, and which thenceforth on the lessee's part ought to be observed and performed: provided always that, in the event of the breach of the covenants by the lessee thereinbefore containcd, the lessors should have the like right of re-entry on the premises as they had in case of a breach of any of the covenants and agreements contained in the lease.

Dimmer proceeded to carry on the business of a jeweller and watchmaker upon that part of the demised premises as to which he was not placed under any restriction by the agreement

of compromise. He desired to fix on the outside of the wall of his shop, fronting on Church Street, a large clock. He applied to the lessors for their consent to his doing this; but they refused to give it, and he thereupon fixed the clock without their consent. The clock was placed at a height of about thirty feet above the ground. It had two faces, one looking to the east, the other to the west, the street running east and west. On one face were the words, "Dimmer, Watchmaker"; on the other face the words, "Dimmer, Goldsmith." The clock was lighted at night by electricity. It was four feet in diameter and two feet on the face. An architect who gave evidence for the plaintiffs said that the clock was "like a drum." The clock was fixed to the stone wall of the house by means of six iron bolts, which were bored into the stone to a depth, as the witness said, of six inches. The witness said that if the clock were taken down it would cost from 15*l.* to 20*l.* to restore the building to its original state, and he added that it would be necessary to take out the stones in which the holes were bored and put in new stones. The works of the clock were not inside the drum, but were within the house, the hands of the clock being connected with them.

This action was brought by the lessors against Dimmer. The plaintiffs claimed a declaration that the erection of the clock was a breach of the covenant not to make or suffer to be made any alteration to the demised premises without the consent in writing of the lessors, and an injunction to restrain the defendant from erecting the clock in breach of the covenant, and ordering him to remove it and to make good the wall of the premises. The plaintiffs also claimed damages and costs.

Farwell J. on March 11, 1902, held that the erection of the clock was a breach of the covenant, and he granted a mandatory injunction ordering the defendant to remove the clock and restore the wall.

The defendant appealed.

Jenkins, K.C., and *John Rutherford*, for the defendant. It may be that, if the widest possible meaning is given to the

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words, the erection of this clock is "an alteration to" the demised premises. But it is submitted that the covenant is aimed only at structural alterations. If a house were demised to an innkeeper by a lease containing a similar covenant, would the tenant be prevented from putting up a sign in the ordinary way? Such a case is almost equivalent to the present case. The clock is affixed to that part of the premises which is not subject to the restriction imposed by the agreement of compromise of March 1, 1901. The fact that by that agreement the defendant is prevented from advertising the business of a jeweller upon one part of the premises seems to imply that he is at liberty to do so upon the other part. The clock is really an advertisement of the defendant's business, and it is a mode of advertisement commonly adopted by watchmakers. This kind of covenant is not unusual in leases, and in the books of precedents a covenant not to put up trade signs is inserted as a distinct covenant from one not to make alterations in the demised premises. No decided case can be found on the construction of a covenant of the latter kind, though there are authorities upon the meaning of the word "alteration" in s. 13 of the Settled Land Act, 1890 (53 & 54 Vict. c. 69). If the learned judge is right, the defendant could not fix up a clock inside his shop or a gas-bracket in the house. The covenant ought to be construed reasonably, having regard to all the circumstances of the case and the general provisions of the lease. The covenant could not have been intended to prevent the tenant from putting up ordinary trade or domestic fixtures, though, literally construed, it might do so. It is submitted that the covenant was intended only to prevent structural alterations of the premises, so that at the end of the term they might go back to the lessors substantially in the condition in which the tenant had received them. If the tenant cannot put up a trade fixture without making a structural alteration in the premises, then he cannot do it without the lessors' consent.

At any rate, the plaintiffs have suffered no damage; they are asserting a bare legal right, and the maxim "De minimis non curat lex" applies. The Court has a discretion as to

granting an injunction, and this applies with special force to a mandatory injunction. When, as here, the action has been commenced after the act which it is sought to restrain has been done, the Court (though it has jurisdiction to grant a mandatory injunction) will consider all the circumstances, even though there is an express negative covenant.

[VAUGHAN WILLIAMS L.J. referred to *Attorney-General* v. *London and North Western Ry. Co.* (1)]

That was not a case of mandatory injunction. When the Court is asked to grant a mandatory injunction it will take into consideration the balance of convenience and inconvenience. In this respect there is a great distinction between a mandatory injunction and an anticipatory injunction.

[An argument was also directed to the question whether the clock was a trade fixture, and several cases upon the law of fixtures were cited; but, inasmuch as the judgment of the Court did not turn upon this point, that portion of the argument is omitted.]

Butcher, *K.C.*, and *W. H. Cochran*, for the plaintiffs. As regards the granting of a mandatory injunction, it is a material circumstance that the defendant chose to put up the clock after the plaintiffs had expressly refused to give their consent. The plaintiffs have not been guilty of any laches, and they have not in any way encouraged the defendant.

But the real question is what is the meaning of the covenant. The exception from it of the alterations provided for by the earlier covenant is very material for the purpose of construing the later covenant. The exception is not limited to structural alterations, and this shews that something other than structural alterations is within the covenant not to make any alteration. It is submitted that anything which can fairly be called an "alteration to the premises" is an "alteration" within the covenant, excepting of course those things which are mentioned in the earlier positive covenant. In putting up this clock a physical alteration to the demised premises themselves has been made. If six holes may be bored in the stone-work, why not 600? There has been a material alteration in the structure

(1) [1900] 1 Q. B. 78.

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of the building. The word "structural" does not occur in the covenant; but, even if it is to be limited to "structural" alterations, it is submitted that this is a structural alteration. But it is contended that the covenant includes more than structural alterations. In other parts of the lease the word "structural" is used, and this shews that the parties had the distinction present to their minds.

[VAUGHAN WILLIAMS L.J. Making a hole in a wall is not necessarily a structural alteration: *Leigh* v. *Taylor*. (1)]

But it is submitted that a hole as large as those into which these bolts have been driven is a structural alteration. And, indeed, the defendant in effect claims the right to make any number of such holes. The question is no doubt one of degree. It is submitted that the covenant includes every alteration to the premises, except any which are so minute that the Court will not take notice of them. Putting up a gas-lamp, whether inside or outside the house, would be an alteration of a totally different character from putting up this clock. A gas-bracket might be said to be necessary for the convenient occupation of the premises. The clock is a luxury —not a necessity. The fixing of it is not an alteration of a trivial character, such as the putting up of a gas-bracket or the hanging of a picture on a wall. Six holes of considerable size and depth are made in the wall, and it would cost, as the evidence shews, from 15*l*. to 20*l*. to remove the clock and restore the wall. The question is whether the clock comes within the bargain which the parties have made. In the cases about tenant's fixtures the question was whether a thing could be removed by the tenant, not whether he was entitled to put it up. The lessors may well have wished to protect themselves by this covenant against questions which might possibly arise about tenant's fixtures. There would be nothing unreasonable in that. It is submitted that at any rate the only things excepted from the covenant are such alterations as would be absolutely essential to the carrying on of the tenant's business.

[STIRLING L.J. Do you mean something without which the

(1) [1902] A. C. 157.

business could not be carried on at all, or something without which it could not be conveniently carried on in the ordinary way?]

It must be something which in the view of both parties is essential to the business. Such a thing as a gas-bracket must have been in the contemplation of both parties as necessary for the business. The plaintiffs do not complain of the clock itself as an alteration, but of the alteration in the fabric of the building which is involved in the erection of the clock—that is, the boring of the holes in the wall. The lessors have covenanted to repair the outside of the premises, and the tenant is not entitled to throw a greater burden upon them. If the lessors had desired to protect themselves against such an act as the erection of this clock, what more apt words could they have used?

Jenkins, K.C., in reply.

VAUGHAN WILLIAMS L.J. The decision of this case depends upon the construction of a short covenant in a lease. We have to take into consideration the whole of the lease and the purposes for which it was granted, and then to see what is the proper construction of the particular covenant. The premises in question, though not originally demised for that purpose, were premises upon a part of which the business of a jeweller and watchmaker was to be carried on by the assignee of the lease, and that part came to be occupied for that purpose. An assignment of the lease was made originally without the licence of the lessors, and they brought an action against the assignee to recover possession of the premises on the ground of forfeiture. That action was compromised, and an agreement was entered into by which the lessors accepted the assignee as their tenant, and he entered into a covenant that he would not carry on upon a specified part of the premises the business of a jeweller or watchmaker, and would not advertise or indicate any such business on or over any portion of the restricted premises. This restriction shews that the parties contemplated that the assignee might carry on that business on the other part of the demised premises, and that he might advertise or indicate

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his business on that part. I do not say that this provision throws much light upon the construction of the covenant in the original lease, but I think it is evidence of what both parties to the agreement had in their contemplation as an ordinary incident of the business of a jeweller and watchmaker. [His Lordship read the covenant in the lease, and continued:—]

We have to construe the word "alteration" in this covenant. I feel very strongly that it would be really impossible to hold that every addition to the premises, whether it does or does not alter the form or structure of the premises, is within the meaning of the word "alteration" in the covenant. The result of so holding would be that this tenant carrying on the business of a watchmaker and jeweller would not be able to put up a fixed blind on the outside of the window of his shop, or to put a lamp outside in front of his main door, or even to place a knocker upon the door. That would really be an impossible construction. And, indeed, the agreement of March, 1901, itself shews that the parties recognised that persons engaged in such a business would outside the building do all sorts of things which would come within the prohibition of the covenant if the word "alteration" were so widely construed. It is true that we are not entitled to make a new agreement for the parties, but in construing the covenant a line must be drawn somewhere. I am not sure that it is our duty to draw the line with reference to questions which do not arise in this case; and when we have to say whether the erection of this clock comes within the word "alteration" in the covenant, we might be content with saying that, wherever the line is drawn, this clock does not come within the word "alteration." But I prefer, if I can, to draw the line more definitely. I was much struck by what Mr. Butcher said, namely, that the plaintiffs could not complain of the clock itself, but that what they complained of was the holes made in one of the stones of the wall for the driving in the iron bolts, as to which the plaintiffs' surveyor said that in order to restore the structure to its former condition it would not be sufficient to plug the holes, but it would be necessary to put in a fresh stone, which would cost from 15*l.* to 20*l.* However that may be, does this

covenant extend to an alteration which does not affect the structure of the premises? Though I took at first a different view of the lessee's covenant to expend 400*l.* in alterations, yet, after hearing the arguments of the counsel for the appellant, I now think that that covenant relates to the expenditure of money in permanent alterations which affect the structure of the building, and this confirms the view which I take of the covenant which we have to construe. In my opinion, the words "alteration to the said premises" apply only to alterations which would affect the form or structure of the premises. But, whether I am right or wrong in so drawing the line, I desire to add that, in my opinion, we ought so to draw the line as that the covenant will not operate to prevent a tenant who was entitled to carry on his business from doing those acts which are convenient and usual for a tradesman to do in the ordinary conduct of his business. So to construe the covenant that the tradesman could not affix a lamp or, as here, a clock to the front of his shop if he thought it convenient to do so for the purposes of his business is, as it seems to me, a construction which could not have been in the contemplation of the parties. Taking the view which I do of the construction of this covenant, I think the conclusion of Farwell J. was wrong, and consequently that the appeal ought to be allowed and the injunction dissolved.

STIRLING L.J. I am sorry that I am unable to agree with the view taken by Farwell J. The case really turns entirely upon the construction of the one word "alteration" in the covenant. [His Lordship read the covenant.] The exception of that which is expressly provided for refers us back to the earlier covenant by the lessee to expend the sum of 400*l.* in making alterations to be approved by the lessors' surveyor. That earlier covenant might have thrown some light on the construction of the later covenant which we have to construe, if we had known what alterations were approved by the surveyor. There is, however, as to that no evidence whatever. But I may observe that it is apparent on the face of the lease that the alterations which were to be made were

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such as were appropriate to the enjoyment of the demised premises by the lessee as a place of business. The lease has been assigned to the defendant, who has since been accepted by the plaintiffs as their tenant. It was admitted by Mr. Butcher that he could not contend that the word "alteration" was to be read literally without any qualification. He admitted that there must be excepted from it such alterations as are necessary for the enjoyment of this part of the premises as a jeweller's shop. I think Mr. Butcher was right in admitting that it could not have been in the contemplation of the parties that the tenant should be bound to obtain the written consent of the lessors to the addition and fixing of anything necessary for the enjoyment of the premises as a jeweller's shop. But in my opinion that limitation does not go far enough. I think the exception ought not to be limited to such alterations as are absolutely essential to carrying on the business (by which I mean alterations without which the business could not be carried on), but it ought to extend to all things fixed to the premises and convenient for the carrying on the business in a reasonable, ordinary, and proper way. That being so, the erection of this clock was in my judgment a reasonable and proper mode of giving notice to the public of the business which the defendant is carrying on in the premises. I think the appeal should be allowed.

COZENS-HARDY L.J. I agree. Two points were taken before Farwell J. The first was that, even if the erection of the clock was a breach of the covenant, still a mandatory injunction ought not under the circumstances to be granted. On that point I entirely agree with the judgment of Farwell J. In my opinion, when a man who has entered into a covenant of this kind deliberately after notice of objection commits a breach of it, and there has been no laches on the part of the covenantee, it would be a most dangerous doctrine to hold that a mandatory injunction ought not to be granted.

But as regards the construction of the covenant, I regret that I am unable to agree with Farwell J. It is plain that some limitation must be put on the word "alteration." It

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could not apply to a change of the paper of a room, to the putting up of a gas-bracket, or the fixing of an electric bell, though in fixing it some holes would be made in the wall. The argument comes in substance to this, that the abstraction of a few cubic inches from the wall of the house is an "alteration" within the meaning of the covenant. I cannot take that view. In my opinion the covenant ought to be limited in the way put by my brother Vaughan Williams—that is, it should be limited to something which alters the form or structure of the building. I think, therefore, that there has been no breach of the covenant, and that the appeal should be allowed.

Solicitors: *Norris, Allens & Chapman, for North, Kirk & Cornett, Liverpool; W. W. Wynne & Sons, for Whitley & Co., Liverpool.*

W. L. C.

STAGG *v.* MEDWAY (UPPER) NAVIGATION COMPANY.

C. A. 1902 SWINFEN EADY J. *March* 14. C. A. *Dec.* 11, 12, 20.

[1902 S. 624.]

Statutory Corporation—Company incorporated by Statute—Power to charge Surplus Lands—Existing Debt.

A navigation company incorporated by statute had power under a special Act (with which the Lands Clauses Consolidation Act, 1845, was not incorporated) to borrow money upon the security of a mortgage of their undertaking, but no express power was given to mortgage their surplus lands:—

Held, that the company could create a valid charge upon their surplus lands to secure an existing debt in respect of which the creditor by obtaining judgment would be able to take the surplus lands in execution under a writ of elegit.

Blackmore v. *Yates*, (1867) L. R. 2 Ex. 225, approved.

Decision of Swinfen Eady J. affirmed.

MOTION by the plaintiff for an injunction to restrain the defendant company from giving a charge upon their surplus lands.

The company were originally incorporated by an Act passed in 1664, which was revived and amended by an Act passed in

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1739, under the name of the Company of Proprietors of the Navigation of the River Medway, with powers to improve the navigation of that river. Neither of those Acts contained any borrowing powers.

By an indenture dated February 19, 1874, the company purported to mortgage the whole of their lands, tolls, rates, and duties in fee, to secure to the mortgagees the repayment of 12,400*l.*, with interest. This mortgage was several times transferred, and was partly paid off. At the date of the Act of 1892 next mentioned 6000*l.* remained due on the security.

By the Medway (Upper) Navigation Act, 1892 (55 & 56 Vict. c. lxxxvii.), the name of the company was changed to that of the Medway (Upper) Navigation Company. The Lands Clauses Consolidation Act, 1845, was not incorporated with the Act.

The Act contained a recital that "it is expedient that the company should be empowered to pay off the moneys due" on the mortgage of 1874, "notwithstanding any question as to the legality of such mortgage." Sect. 13 provided that "notwithstanding any question as to the legality of the power of the company to borrow the moneys secured by" the above-mentioned mortgage, "and which moneys have been expended upon the undertaking, the company shall be at liberty to repay the amount so secured. And for the purpose of paying off such mortgage the company may borrow on mortgage of their undertaking any sum not exceeding 6000*l.* Provided that the amount to be borrowed under the general borrowing powers conferred by this Act shall be reduced by the amount borrowed under this section."

Sect. 14 empowered the company, beyond their then existing capital of 15,800*l.*, to raise any additional capital, not exceeding in the whole 30,000*l.*, by the issue at their option of new ordinary shares or stock or new preference shares or stock. Sect. 15 authorized the company, in respect of the additional capital of 30,000*l.*, "from time to time to borrow on mortgage of the undertaking any sum not exceeding in the whole 10,000*l.*, but no part thereof shall be borrowed until shares for so much of the said additional capital as is to be raised by means of shares are issued and accepted, and one-half of such capital

is paid up, ... and until stock for one-half of so much of the said additional capital as is to be raised by means of stock is fully paid up."

By s. 16, "the company may create and issue debenture stock, subject to the provisions of Part III. of the Companies Clauses Act, 1863, but, notwithstanding anything therein contained, the interest of all debenture stock and of all mortgages at any time after the passing of this Act created and issued or granted by the company under this Act or any subsequent Act shall, subject to the provisions of any subsequent Act, rank pari passu (without respect to the date of the securities or of the Acts of Parliament or resolutions by which the stock and mortgages were authorized), and shall have priority over all principal moneys secured by such mortgages. Notice of the effect of this enactment shall be indorsed on all mortgages and certificates of debenture stock."

By s. 18, "(1.) The company may retain and hold any lands for the time being vested in them which, in the opinion of the company, are or will eventually be required for the purposes of the undertaking, and the company may either let those lands at such rent and on such terms and conditions as they think fit, or the company may themselves cultivate the lands or use them for any purpose they think fit. (2.) The company may sell any lands for the time being vested in them which in their opinion will not be required for the purposes of the undertaking at such price, and on such terms and conditions as they think fit. (3.) Any money received by the company in respect of the sale, letting, cultivation, or use of any lands under this section shall be applied by the company, if attributable to income, as income, and if attributable to capital shall be applied in repayment of any money borrowed under or legalized by this Act, or for any other purpose for which capital is properly applicable, and, if not so applied or until so applied, may be invested in any manner in which trustees are for the time being authorized by law to invest trust funds, or in any other manner authorized by the company at a general meeting."

The company had not raised any additional capital under the power conferred by s. 14.

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In 1893 the company, in exercise of the power given to them by s. 13, borrowed 6000*l.* from W. Levett, on the security of a mortgage of their undertaking, and therewith they paid the old mortgage debt. The mortgage to Levett contained a covenant by the company that any moneys attributable to capital which should arise from the sale, letting, or cultivation of any lands of the company, in exercise of any of their powers under the Act, should be applied in the first place in or towards satisfaction of the mortgage debt; and also that, so long as any moneys should remain owing on that security, Levett should be entitled to hold the documents of title relating to all lands of the company.

In 1902, the mortgage debt being still due, Levett required payment. The company had found persons who were willing to take a transfer of the mortgage, but they required a further security upon the surplus lands of the company. A draft deed was accordingly prepared and agreed to, by which the existing mortgage was transferred to the transferees, and the company charged "All the lands, tenements, and hereditaments for the time being belonging to the company which in their opinion shall not be required for the purposes of their undertaking, and also all proceeds of the sale thereof or otherwise arising therefrom, with the repayment to the transferees of the sum of 6000*l.* and interest."

This action was brought by a shareholder, who was also one of the directors of the company, against the company, claiming a declaration that the proposed charge on the surplus lands would be ultra vires the company, and an injunction to restrain the company from giving the charge.

The plaintiff moved for an injunction before Swinfen Eady J. on March 14, 1902.

Vernon Smith, K.C., and *Leeke*, for the plaintiff. The only borrowing power which the company have is that which is given to them by s. 13 of the Act of 1892, and that power is limited to a mortgage of their undertaking. When an Act of Parliament gives a corporation power to borrow in a particular way, it by implication forbids their borrowing in any other

way: *Baroness Wenlock* v. *River Dee Co.* (1) Lord Watson there states the rule absolutely, and it clearly governs the present case. The same proposition of law is strongly stated by Bowen L.J. in *Putney Overseers* v. *London and South Western Ry. Co.* (2)

Gardner v. *London, Chatham and Dover Ry. Co.* (3) may be cited as an authority adverse to the plaintiff; but the case of a railway company is different, because they are bound to sell their surplus lands, and the adjoining landowner has under the Lands Clauses Consolidation Act, 1845, a right of pre-emption. By s. 18 of the defendant company's Act they are empowered to sell their surplus lands, but it is not made obligatory to do so. In *Gardner* v. *London, Chatham and Dover Ry. Co.* (3) the charge was only upon the moneys to arise from the sale of surplus lands, and it was not intended that the mortgagee should be in a position to take possession of the lands. If this proposed charge were given, the mortgagees would have a power of sale by virtue of the Conveyancing Act, and could apply capital moneys in discharge of arrears of interest in priority to capital due to other mortgagees or debenture-holders, and might so defeat the provisions of s. 18.

Looking at the Act as a whole, it is plain that a mortgage given under s. 13 was intended to be only of the undertaking, of which, as is shewn by *Gardner* v. *London, Chatham and Dover Ry. Co.* (3), the surplus lands do not form part.

Theobald, K.C., and *Dunham*, for the defendant company. It would be a very forced construction to construe s. 13 as limiting the general borrowing powers of the company. All companies have power to charge their surplus lands, even in the absence of express power to do so: *Gardner* v. *London, Chatham and Dover Ry. Co.* (3) The charge given there was on the surplus lands as well as on the proceeds of sale of those lands, and if the charge on the surplus lands had been bad the whole security would have failed. The existing mortgage to Levett really gave a charge on the surplus lands, for the title-deeds were given to the mortgagee. The transferees only want

(1) (1885) 10 App. Cas. 354. (2) [1891] 1 Q. B. 440, 442.
(3) (1867) L. R. 2 Ch. 201, 219.

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this point made plain. The charge does not give a power of sale; and if it did, the proceeds of sale could not be applied in any way contrary to the provisions of s. 18, for every charge must be subject to the provisions of the statute. That is the view of all the authorities. *Blackmore* v. *Yates* (1) shews that the charge is valid.

[SWINFEN EADY J. That case turned on the power of the creditor to take the rolling stock of the company in execution.]

If the lands were admitted to be surplus lands, the creditor could have execution by elegit, and might obtain a sale of the lands: see Browne and Theobald on Railways, 3rd ed. p. 83.

Pickering v. *Ilfracombe Ry. Co.* (2) is an authority that the charge would not be invalid even though a power of sale might be.

[*Reg.* v. *Reed* (3) was also referred to.]

SWINFEN EADY J., after stating the facts, continued:—It may be observed that this is not a case of borrowing; the company do not now contemplate borrowing. They have exhausted their power under s. 13. They did borrow nine years ago, and the debt of 6000*l.* now owing is an indisputably valid debt presently payable. Then the company make terms, or are proposing to make terms, with their debtor or with the transferee of the existing debtor—with their new debtors. In considering the question whether the charge is valid or not, I approach it from this point of view. There is an existing debt which the present mortgagee may enforce. He can sue the company and obtain judgment for his debt; and, having obtained judgment, he could issue an elegit to take the land in execution. He could take in execution the superfluous lands of the company; and if any question should arise, as between himself and the company, as to what lands were extended under the elegit, and what lands were in fact superfluous, then *Ex parte Grissell* (4) shews what would be done on such an occasion. In that case there was an execution creditor, and, upon a petition for sale of the superfluous lands

(1) L. R. 2 Ex. 225.
(2) (1868) L. R. 3 C. P. 235.
(3) (1880) 5 Q. B. D. 483, 488.
(4) (1867) L. R. 2 Ch. 385.

of the railway company, the Court directed "an inquiry what lands and property have been extended under or by virtue of the writ of elegit in the petition mentioned, and what are the nature and particulars of the interest of the said company in such lands and property, and of their title thereto; and whether any, and which, of such lands are superfluous lands, and not required for the purposes of the undertaking of the said company."

It would appear to be a singular result that a creditor of the company could sue them, obtain execution, take the superfluous lands in execution, and obtain an order for their sale, and yet the company could not to prevent that process charge the land. A somewhat similar question, not with regard to land, but with regard to rolling stock, did arise in *Blackmore* v. *Yates*. (1) That was a decision before the Railway Companies Act of 1867, which precluded rolling stock being taken in execution. In that case the creditor, who had not obtained judgment, but whose claim was compromised before judgment, agreed to the compromise upon the terms that the railway company should transfer to him the whole of their rolling stock as security, and that transfer was made. Then subsequently another creditor obtained judgment against the company, and issued execution on the same rolling stock, and a question arose between the transferee of the rolling stock and the execution creditor. The Court of Exchequer held that the transferee of the rolling stock had the prior title; and in answer to an objection that the transfer was ultra vires the company, it was pointed out that the same result could have been obtained by judgment and execution; that the company only anticipated that course, and, the creditor being in a condition to obtain judgment and the company having consented to transfer the rolling stock to him without his carrying his action to a termination, the transfer was held good. I am unable to draw any distinction between that case and the case now before me. If chattels or land can be taken in execution for an existing debt, the company can, in my opinion, execute a valid charge upon the chattels or

(1) L. R. 2 Ex. 225.

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the land, and so anticipate the process of law. Upon this ground I am of opinion that the motion fails, and that, although no authority to charge the surplus land is expressly conferred by the statute, it is conferred by implication. The argument that has been addressed to me with regard to raising money on mortgage does not, in my judgment, apply when the question is not one of creating a fresh loan, but of arranging terms for an antecedent debt, contracted years ago, and admittedly valid. I must therefore refuse the injunction.

J. R. B.

C. A.

It was agreed that the hearing of the motion should be treated as the trial of the action.

The plaintiff appealed. The appeal came on for hearing on December 11, 1902.

Meanwhile the proposed charge had been executed by the company. The transferees of the mortgage were not made parties to the action.

Rowden, K.C., and *Leeke*, for the plaintiff.

Theobald, K.C., and *Dunham*, for the defendant company.

The arguments adduced in the Court below were repeated, and the same authorities were cited. The following cases were also referred to: *De Winton* v. *Brecon Corporation* (1); *Ex parte Grissell* (2); *In re Ogilvie*. (3)

Cur. adv. vult.

Dec. 20. VAUGHAN WILLIAMS L.J. read the following judgment:—I think that the judgment of Swinfen Eady J. was quite right and ought to be affirmed. The judgment of the learned judge is based upon principles recognised, as he points out both in *Ex parte Grissell* (2) and in *Blackmore* v. *Yates*. (4) This, as Swinfen Eady J. points out, is not a case of borrowing, or where the company contemplate borrowing. There was an existing debt, the validity of which is recognised by the Medway (Upper) Navigation Act, 1892. The company, acting under the powers of s. 13 of that Act, borrowed 6000*l*. of

(1) (1859) 26 Beav. 533, 543.
(2) L. R. 2 Ch. 385.
(3) (1871) L. R. 7 Ch. 174.
(4) L. R. 2 Ex. 225.

Mr. Levett on a mortgage of their undertaking contained in a deed of February 18, 1893. This mortgage debt is now due, and the company have found certain persons who are willing to take a transfer of Mr. Levett's mortgage, but who require as a further security a charge on the surplus lands of the company. The sole question, therefore, is, Can the company give this charge to secure this valid existing debt? I think the company can do so, and that to do so is not ultra vires. The observation of Lord Cairns in *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) seems plainly to apply: "It cannot, in my opinion, be doubted but that the company, owing a sum to their contractors for works done, might have paid this sum out of those surplus sale moneys (the claim of debenture-holders being out of the way); and, if so, they might equally, as I think, have given the contractors a charge upon the sale moneys for the amount." It is true that this observation deals only with proceeds of the sale of surplus lands, and not with the surplus lands themselves, but the security there given was a charge upon the surplus lands and the rents and proceeds of the sale of those lands, and the principle involved in the observation does not seem to be affected by being applied to the proceeds. I do not gather that Lord Cairns meant to exclude surplus lands, at all events in any case in which such lands were extendible by elegit, and could thus be compulsorily applied to the satisfaction of the creditor's debt. This principle is recognised in *Blackmore* v. *Yates* (2), where a railway company conveyed to a creditor (before the Act for the protection of rolling stock) their rolling stock as security. I do not think that one ought to read the observations of Martin B., declining to determine what the shareholders or the Attorney-General might do to prevent the charge being given, as really affecting the principle. It is a remark made ex abundanti cautelâ. In *In re Calne Ry. Co.* (3) and *In re Ogilvie* (4) the right of a judgment creditor of a railway company to obtain an order for a conveyance in the former case and an order for sale in the latter was recognised. It is true that the

(1) L. R. 2 Ch. 219.
(2) L. R. 2 Ex. 225.
(3) (1870) L. R. 9 Eq. 658.
(4) L. R. 7 Ch. 174.

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transferees of this mortgage debt are not judgment creditors, but they could as transferees obtain judgment, and the company may give them by arrangement that which they could obtain by judgment.

This being so, it is only necessary to ascertain whether there is anything in the Act of 1892 precluding this company from thus dealing with their surplus lands. I think not. Sect. 16, which was pressed upon us, only deals with priorities. Sect. 18, sub-s. 2, does not seem to me to preclude a mortgage to secure an existing debt. It may be that there will be nothing upon which the mortgage can attach until the company have declared that in their opinion particular land will not be required for the purposes of the undertaking, but this does not make the mortgage ultra vires. I see nothing in s. 18, sub-s. 3, to prevent the company from applying moneys received in respect of the sale of surplus lands in payment of their debts. I think this appeal should be dismissed with costs.

STIRLING L.J. I agree with the conclusion just expressed by my Lord, and with the reasons which he has given; but, on account of the importance of the case, I wish to state shortly in my own words the reasons which influence me. Upon the facts, I think this is not a case of borrowing by the company.

The company in the year 1893 validly and properly borrowed a sum of 6000*l.* on the security of a mortgage of their undertaking. That sum of 6000*l.* is now payable, and the mortgagee has applied to the company for payment. The company, not being prepared to pay, have found a person who is willing to take a transfer of the mortgage upon the terms that he shall have an additional security in the shape of a charge upon the company's surplus lands. Now, the transferee being, as regards the debt, precisely in the position of the original mortgagee, the case ought, I think, to be considered exactly as if the original mortgagee were now applying for payment, and were being offered additional security which he was willing to accept. The transaction is in effect an arrangement made between the company and their creditor for the payment of a valid debt which is presently payable.

The company are a statutory corporation, and have therefore only such powers as the Legislature has conferred on them, whether expressly or by necessary implication. The Legislature, by s. 13 of the Act of 1892, has conferred on the company a power of borrowing; but in my view of the facts the borrowing powers of the company are not now sought to be exercised. The company have power to contract debts, by borrowing and otherwise, for the purposes for which they are incorporated. The company having incurred debts, by borrowing or otherwise, are under an obligation to pay those debts when they become due. Of necessity they must have power to make proper business arrangements for the payment of those debts when they become due, and in my judgment that includes power to give security to the creditor in a case in which the company are not in a position to make immediate payment of his debt. The existence of such a power on the part of the company is, I think, clearly recognised in both *Pickering* v. *Ilfracombe Ry. Co.* (1) and in *Gardner* v. *London, Chatham and Dover Ry. Co.* (2), cases, especially the second, of very high authority.

In the present case the company have given the transferee of the mortgage an equitable charge on "all the lands, tenements, and hereditaments for the time being belonging to the company which in their opinion shall not be required for the purposes of their undertaking, and also all proceeds of the sale thereof, or otherwise arising therefrom." Various objections have been taken to the giving of this charge. First, it was said that the company would in that way be infringing s. 16 of the Act of 1892, which puts all holders of mortgages and of debenture stock on the same footing. But, as appears from *Gardner* v. *London, Chatham and Dover Ry. Co.* (2), the surplus lands of a company of this kind do not form part of their undertaking, and, therefore, lie outside the mortgages of the undertaking of this company which are authorized by s. 13 of their Act, and a charge on those lands does not interfere with the rights of mortgagees or debenture stock holders. Therefore, s. 16 of their Act does not stand in the way of their giving the charge.

(1) L. R. 3 C. P. 235. (2) L. R. 2 Ch. 201, 219.

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But s. 18 is that which was chiefly relied on for the plaintiff. [His Lordship read sub-s. 1 of s. 18, and continued :—] That sub-section relates to lands " which in the opinion of the company are or will be eventually required for the purposes of the undertaking "—that is, a class of lands different from those which are comprised in the equitable charge. Therefore, the power conferred by sub-s. 1 is entirely unaffected by the charge. [His Lordship read sub-s. 2, and continued :—]

Now, that sub-section does, of course, deal with the lands which are charged, and the argument is that, inasmuch as the company have an express statutory power to sell those lands, they are by implication deprived of the power of charging them. Probably to some extent that argument is well founded. For example, if the company were borrowing money, I should say, as at present advised, that they could not create a charge for the money on their surplus lands, because by s. 13, when they are borrowing money, the only security which they have power to give is upon their undertaking. But *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) is an express authority that the company may create a charge on the proceeds of sale of their surplus lands for the purpose of securing a debt already due and payable by the company. In the present case there are no rights of pre-emption, as under the Lands Clauses Consolidation Act, which can hamper the exercise of the power of sale conferred upon the company, and that power may be exercised by the company for their own benefit as and when they think fit, and most certainly may be exercised for the purpose of paying their just debts when they are payable. In these circumstances I can see no reason why the company should not be able to give a charge on their surplus lands for the purpose of securing the payment of a debt, which they are not prepared to pay at the moment—a charge on the lands themselves as well as on the proceeds of their sale.

I should like to add that I have dealt with the case on the footing that the transaction in question is (as on the face of it it appears to be) a bonâ fide one between the company and the transferee of the mortgage. If it were shewn that this power

(1) L. R. 2 Ch. 201, 219.

was being used merely as a cloak for enlarging the borrowing powers of the company, very different considerations would apply, and a very different conclusion might be arrived at. As it is, I think the appeal ought to be dismissed.

COZENS-HARDY L.J. read his judgment as follows:—This appeal raises the question whether it is competent to the defendant company to give a charge for an admitted debt upon the superfluous lands of the company, and the proceeds of sale of such lands. The transaction is not one of borrowing. It will be convenient to consider this question in the first instance as though the defendant company were a railway company governed by ss. 127 to 131 of the Lands Clauses Consolidation Act, 1845, and afterwards to consider the language of the special Act governing the defendant company. It was expressly decided by the Court of Appeal in 1867 in *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) that such a charge would be good as against the surplus sale moneys. The language of Lord Cairns is explicit on this point (2): "It cannot, in my opinion, be doubted but that the company, owing a sum to their contractors for works done, might have paid this sum out of those surplus sale moneys (the claim of debenture-holders being out of the way); and, if so, they might equally, as I think, have given the contractors a charge upon the sale moneys for the amount. There ought, I think, to be an order in the suit of the Imperial Mercantile Credit Association for a receiver of these particular sale moneys; and as it is desired to save the expense of a receiver's salary, some officer of the company may, perhaps, act without salary, or the purchasers may have liberty to pay their purchase moneys into Court direct." It was not necessary in that case to go any further. The company would doubtless have been involved in trouble and expense in dealing with a great number of small strips of land if the concurrence of the contractors, whose debt was 135,000*l.*, had been necessary to the completion of every transaction. The contractors were content with the charge given by the Lords Justices upon the sale moneys. I cannot,

(1) L. R. 2 Ch. 201. (2) L. R. 2 Ch. 219.

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however, read that judgment as a decision that the surplus land could not be charged, though the proceeds of sale might be charged, nor can I see any ground for such a distinction. It has repeatedly been held that a judgment creditor to whom land has been delivered in execution may obtain an order for sale of superfluous lands, although under ordinary circumstances the Court would in the first instance only direct an inquiry as to what lands are superfluous and whether there are any incumbrancers: see *Ex parte Grissell.* (1) It has never been held that the obligations imposed upon the company to sell the superfluous land within a certain period or under some circumstances to give a right of pre-emption to the adjoining owner were obligations of such a nature as to be inconsistent with a sale. The judgment of James V.-C. in *In re Calne Ry. Co.* (2) is a clear authority on this point. In that case the judgment creditor obtained an immediate order for sale under 27 & 28 Vict. c. 112 to the adjoining owner, who had a right of pre-emption, and the Court ordered the company to join in the conveyance. The Vice-Chancellor pointed out that under 1 & 2 Vict. c. 110, s. 13, the judgment creditor had the same remedies as if the company had by writing agreed to charge the land with the judgment debt. Neither a mortgage given expressly nor a mortgage created by virtue of the Judgment Acts over superfluous lands in any way interferes with the company's undertaking. If the company could charge or sell an old engine not required for the purposes of the railway, as I think they could, there seems no reason why the same principle should not apply to surplus lands. The mortgagee will, of course, take such interest only as the company have in the land subject to all rights of pre-emption and other rights which might be available against the company.

It remains to consider whether there is anything in the Medway (Upper) Navigation Act, 1892, to distinguish the position of the defendant company from that of an ordinary railway company. Sect. 18 is the only section which can be seriously relied upon. There are three points of distinction—(1.) no time is limited within which superfluous lands must be

(1) L. R. 2 Ch. 385. (2) L. R. 9 Eq. 658.

sold; (2.) no right of pre-emption is given to adjoining owners; (3.) the opinion of the company and not the verdict of a jury or the judgment of a Court decides whether land is superfluous. I cannot see that these points of distinction are really material. The charge does not profess to extend beyond lands which in the opinion of the company are superfluous lands and the proceeds of sale thereof, nor can I find anything in the directions for application of the purchase-money if the company sell inconsistent with the proposed transaction. For these reasons I think the judgment of Swinfen Eady J. is correct, and that the appeal should be dismissed.

Solicitors: *Routh, Stacey & Castle, for Stenning, Knockers & Thompson, Tonbridge; Tarry, Sherlock & King.*

W. L. C.

In re PHILLIPS' TRUSTS.

[1902 P. 1511.]

Assignment—Priority—Reversionary Trust Fund—Notice to one of several Trustees—Death of Trustee who had Notice.

In a contest for priority between assignees of a reversionary interest in a trust fund where one only of several trustees has notice of an assignment and dies, a subsequent assignee who gives notice of his assignment to the then existing trustees is entitled to priority over the prior assignee:—

So *held* on the authority of *Timson* v. *Ramsbottom*, (1837) 2 Keen, 35; 44 R. R. 183.

UNDER the will of Joseph Phillips, who died in December, 1850, Miss Claire Russell Mortimer was entitled to a share of a trust fund in reversion expectant on the death of her mother and contingently on her surviving her.

By an agreement for settlement dated December 6, 1882, made in contemplation of the marriage of Miss Mortimer with John Lewis Cooke Maclurcan, it was agreed that any property to which she then was or at any time during the marriage she or her husband in her right might become entitled should be settled upon the trusts therein mentioned.

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At this date there were three trustees of the will of Joseph Phillips, namely, John Greenwood, George Lewis Parkin, and Henry Mortimer Thompson. Mr. G. L. Parkin, who was a solicitor, prepared the settlement of December 6, 1882, and must therefore have been aware of Mrs. Maclurcan's assignment of her interest under the will, but it did not appear that he ever communicated his knowledge to his co-trustees, and no formal notice of the settlement was ever given to the trustees. In 1887, Mr. John Greenwood and Mr. G. L. Parkin being then dead, Mr. Montagu Lewis Parkin and Mr. Edward Greenwood were appointed trustees of the will in their place.

By an indenture dated January 24, 1894, Mrs. Maclurcan for valuable consideration assigned her reversionary interest under the will to the Law Life Assurance Society.

Prior to the execution of this indenture the society caused inquiries to be made of each of the trustees of the will as to notices of dealings by Mrs. Maclurcan with her reversionary interest, but they were not informed of the existence of the settlement of December 6, 1882, inasmuch as none of the then existing trustees had ever received any notice of it.

Mrs. Maclurcan also made a statutory declaration that no settlement was executed on her marriage.

On the completion of the purchase notice in writing of the indenture of January 24, 1894, was given to each of the trustees.

Mrs. Maclurcan survived her mother and died very shortly afterwards, on August 8, 1901, leaving her surviving one daughter, an infant, who was now the sole beneficiary under the settlement of December 6, 1882.

The fund having thus fallen into possession, Mrs. Maclurcan's share was claimed by the Law Life Assurance Society as against the beneficiary under the marriage settlement; accordingly the trustees of the will paid the amount of the share, 727*l.* 8*s.* 3*d.*, into court. The Law Life Assurance Society now took out a summons against the surviving trustee of the will, the trustee of the settlement, and the infant beneficiary for payment of the fund in court to them.

T. T. Method, for the Law Life Assurance Society. Where notice of an incumbrance on a trust fund is given to one only of several trustees and that trustee dies, a subsequent incumbrancer who gives notice to all the existing trustees is entitled to priority: *Timson* v. *Ramsbottom* (1); *In re Hall.* (2) *Timson* v. *Ramsbottom* (1) has been recognised as an authority by Wigram V.-C. in *Meux* v. *Bell* (3), and by the Court of Appeal in *In re Wyatt* (4), although upon the appeal of that case to the House of Lords sub nom. *Ward* v. *Duncombe* (5) Lord Macnaghten appears to throw some doubt upon it. In *In re Wasdale* (6) Stirling J. held that an assignee who gave notice to all the trustees in existence at the time of his assignment took priority over an assignee who took his assignment after the death or retirement of all those trustees and gave notice of the assignment to the new trustees, and he distinguished *Timson* v. *Ramsbottom* (1) and *In re Hall.* (2) That was a different case. Upon the authorities the applicants are entitled to priority.

W. M. Cann, for the surviving trustee of the will.

C. W. Procter, for the infant beneficiary and the trustee of the settlement. If the trustee who prepared the settlement had survived his co-trustees the right of the infant daughter to priority would have been clear; but it is contended upon the authority of *Timson* v. *Ramsbottom* (1) that because he predeceased his co-trustees her right is lost. It is inequitable that this question of priority should turn upon the accident which of several trustees survives the others. The observations of Lord Macnaghten in *Ward* v. *Duncombe* (5) shew that he did not approve of *Timson* v. *Ramsbottom.* (1) Further, it was the duty of the trustee who had notice of the settlement to perfect the title by giving notice to the other trustees, and, in the absence of evidence to the contrary, the Court will presume that the trustee has done his duty: *Willes* v. *Greenhill* (*No.* 2). (7)

(1) 2 Keen, 35; 44 R. R. 183.
(2) (1880) 7 L. R. Ir. 180.
(3) (1841) 1 Hare, 73, 88; 58 R. R. 41, 49.
(4) [1892] 1 Ch. 188.
(5) [1893] A. C. 369, 394.
(6) [1899] 1 Ch. 163.
(7) (1860) 29 Beav. 387.

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KEKEWICH J. The point, to my mind, is clearly covered by authority. In this case one of the three trustees of a will was a solicitor, and in that character he prepared a settlement of the share of one of the beneficiaries under the will. It is impossible to contend that he himself in his character as trustee of the will had not complete notice of the assignment made by that settlement of the beneficiary's share. He knew it, but he was only one of three trustees, and, fortunately for those claiming under a subsequent assignment, he predeceased his two co-trustees. So far as is known, he never imparted to his co-trustees the knowledge which he himself acquired of the settlement. Whether it was his duty to give that information or not, it must be assumed that he did not give it. That being so, and he having died, the question is whether a subsequent assignee who made proper inquiries from the surviving trustees and got no answer which would lead him to make further inquiries or put him on his guard has priority for his assignment, or whether the assignment by means of the settlement has priority by reason of its bearing a prior date. Now counsel for the infant under the settlement has urged two points. The first, which has been put forward with great force, is that if the prior assignee is displaced by reason of the facts which I have mentioned he is displaced by an accident. The trustee who had notice might have been the survivor—in which case there would be no doubt about the notice being good. I quite see the force of that, and there does seem a certain primâ facie absurdity in the priority of the first assignee depending upon a mere accident. But it is beyond my power to accede to that argument. I am not sure that the point has ever been argued before. At any rate, it has never been held good, and case after case in which that argument ought to have been held good, if it was sound, has been decided adversely to it. The other point depends upon the case of *Willes* v. *Greenhill* (*No.* 2) (1), where Lord Romilly decided that notice to one trustee is notice to all, because it is the duty of that trustee to pass on the notice which he receives to the other trustees, and, in the absence of evidence to the contrary, it will be presumed that he does his

(1) 29 Beav. 387.

duty. That case was appealed, and the decision of Lord Romilly was affirmed by Lord Westbury. (1) I am not sure that he says anything on this point; but, at any rate, this argument has been again and again ignored and treated as not worthy of attention. A case of *Freeman* v. *Laing* (2), before Byrne J., is subsequent to every case which has been cited. I refer to it, not as a decision in point, but as containing a summary of the law on this question. He says (3): "The question is, of course, quite different from that arising when there is a contest between assignees of a fund of personal estate vested in trustees as to priority. In that case it is established that, if one only of the trustees in existence at the date of the second assignment had notice of the prior assignment, the earlier assignee does not lose his priority. It has also been held that an assignee who has given notice to one only of several trustees is not entitled to priority over a subsequent assignee who takes his assignment after the death of the trustee to whom notice has been given." That exactly covers this case. It is true that Byrne J. does not in terms say the point is settled; but his words must be taken as stating what he understood to be the law. Then the learned judge goes on: "And it has also recently been determined by Stirling J. in *In re Wasdale* (4), where the authorities for the former propositions are referred to, that an assignee who has given notice to all the trustees in existence at the time of his assignment is entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all those trustees, and who gives notice of such assignment to the new trustees." I am not sure that there is any point on this particular branch of the law—certainly there is none which has been argued before me in this case—which is not covered by that statement. It seems to me that it entirely concludes this case.

Solicitors: *Walters & Co.; E. G. Watson; Tatham & Procter.*

(1) (1861) 4 D. F. & J. 147.
(2) [1899] 2 Ch. 355.
(3) [1899] 2 Ch. 358.
(4) [1899] 1 Ch. 163.

H. B. H.

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In re BROWNE'S POLICY. BROWNE *v.* BROWNE.

[1902 B. 4324.]

Husband and Wife—Policy of Assurance—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 11—*Policy "for Benefit of Wife and Children" —Death of Wife and subsequent Marriage of Assured.*

A man, who had a wife and children, effected a policy of assurance on his life under the Married Women's Property Act, 1882, s. 11. The policy was expressed to be "for the benefit of his wife and children." The wife died, and the man married again and had a child by his second wife. On his death:—

Held, that the widow and her child were entitled to participate jointly with the children of the first marriage.

ADJOURNED SUMMONS.

On December 31, 1891, George Henry Browne, since deceased, effected a policy on his own life with the Sceptre Life Association, Limited, for the sum of 700*l*. The policy was expressed to be "for the benefit of his wife and children in conformity with the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75)," and provided that the association should on the death of the assured pay the insurance moneys to his said wife and children, or in the event of their prior death to the executors, administrators, and assigns of the assured.

George Henry Browne had seven children by his first wife, Alice Maud, to whom he was married on November 1, 1881, and five of them survived him. All the children were born before the date of the policy.

Alice Maud Browne died on November 29, 1894; and on December 10, 1895, George Henry Browne married his second wife, Florence. By her he had two children, of whom one, Florence M. K. V. Browne, survived him.

On November 12, 1901, George Henry Browne died intestate, and his widow took out letters of administration to his estate.

All the children were infants.

On November 1, 1902, an originating summons was taken

out by the five children of the first marriage (by their next friend), as plaintiffs, against the widow and the child of the second marriage, as defendants, asking (inter alia) whether on the true construction of the trust of the policy the widow and her child were entitled to any and what shares respectively in the policy moneys.

The question was argued in chambers, but, on account of the importance of it, the judgment was delivered in Court.

By the Married Women's Property Act, 1882, s. 11, it is provided that "a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them . . . . shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his . . . . debts."

Gatey, for the children of the first marriage, contended that they took as personæ designatæ, inasmuch as the words "wife" and "children" must be read as referring to the children in esse at the date of the policy.

Hon. Frank Russell, for the widow, contended that the class to take must be ascertained at the death of the assured, and that therefore the widow took.

Austen-Cartmell, for the child of the second marriage, contended that she was entitled to take as being one of the children surviving at the death of the assured. [He referred to *In re Seyton* (1) and *In re Davies' Policy Trusts* (2) as authorities to shew that the widow and children took as joint tenants.]

KEKEWICH J. Mr. George Henry Browne on December 31, 1891, effected a policy of assurance on his own life under the Married Women's Property Act, 1882, s. 11, "for the benefit of his wife and children." He had at that date a wife living, and there were also living children of his by her. That wife died, and he subsequently married the defendant Florence Browne, by whom also he had children. Florence Browne

(1) (1887) 34 Ch. D. 511. (2) [1892] 1 Ch. 90.

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survived him, and so did children of each marriage. The questions are, first, whether Florence Browne takes any interest under the policy; and, secondly, whether the children entitled to take are the children of one marriage exclusive of the children of the other, or whether the children of either marriage all stand on the same footing. It is settled that all parties interested under a policy in this form take as joint tenants.

Regarding the case apart from the language of the Married Women's Property Act, 1882, one is met by the presumption, which is rather one of common parlance and common sense than of law, though it has been recognised by legal authority, that a married man speaking of his wife intends his wife at that time, and does not contemplate one whom he may marry after her death, and the observation holds good respecting allusions by another to a given man's wife. But, in construing an instrument intended to make provision for a wife after the husband's death, this seems to lose weight, and is countervailed by the consideration that he in all probability intended to provide for her who survived him, and for that reason stood in need of the provision. A similar line of reasoning points to the conclusion that he intended to benefit all the children, which is strengthened by the reflection that he cannot reasonably be supposed to have intended to benefit only the children living at the date of the policy to the exclusion of after-born children by the then existing wife. The claim of the children by the second wife to share in the policy moneys is, I think, unanswerable; and if they are let in I fail to see any good reason for excluding their mother.

Turning to the Act, I find little assistance in the language used, which really throws me back on the proper construction of the policy. The Act says that such a policy "shall create a trust in favour of the objects therein named." No one is in the strict sense "named" in this policy, and the word is not happily used. There is no reason why the trust should not include objects as yet unascertained, and, of course, the ordinary marriage settlement creates a trust of that character. Therefore what the Act means is that there is a trust created by the policy in favour of the persons designated thereby, and for such

interests as are there stated according to the true construction of the instrument. I hold that by his wife and children the settlor intended his surviving wife (if any) and his surviving children, whether by his then living or any after-taken wife.

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Solicitors: *Patersons, Snow, Bloxam & Kinder.*

C. C. M. D.

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[1901 P. 966.]

Practice—Discovery of Documents—Rules of Supreme Court, 1883, *Order* XXXI., *rr.* 14–18, 26—*Several Defendants—Affidavit of Documents made on Application of one Defendant—Inspection by Co-defendant—Form of Order.*

In an action against several defendants, where the plaintiff has made an affidavit of documents on the application of one defendant who has paid the usual deposit, it is competent to the Court to make an order on the application of another defendant that the plaintiff do produce for his inspection the documents referred to in the affidavit, and if there is no evasion of the provision of Order XXXI., r. 26, as to deposit, such an order will be made, but with liberty to the plaintiff to withhold or seal up documents not relating to the matters in question between the plaintiff and the last-mentioned defendant.

Moore v. *Peachey*, [1891] 2 Q. B. 707, considered.

THIS action was brought by Pardy's Mozambique Syndicate, Limited, against Louis Charles Alexander and four other defendants, of whom the defendant Emily Bankes Chave was one, alleging that the defendants were promoters of the company, and claiming a declaration that the defendants were jointly and severally liable to pay to the plaintiff company the maximum value of certain shares which were alleged to be in the nature of a secret profit allotted to and received by the defendants.

On November 8, 1902, on the application of the defendant Alexander and payment by him of the usual deposit, the plaintiff company by their secretary made the usual affidavit

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stating what documents were in the possession or power of the company relating to the matters in question in the action, and specifying in Part I. of the schedule to the affidavit the documents which the company were willing to produce.

On November 19, 1902, the defendant Emily Bankes Chave gave notice to the plaintiff company to produce for her inspection the documents referred to in Part I. of the schedule to the affidavit of November 8, 1902, but the plaintiff company declined so to produce them.

On November 26, 1902, the defendant Emily Bankes Chave made an application in chambers that the plaintiffs might be ordered to produce at the office of their solicitors, Messrs. Cheston & Sons, the documents referred to in the first part of the schedule to the affidavit of November 8, 1902, and that the applicant might be at liberty to inspect and peruse the documents so produced, and to take copies and abstracts thereof and extracts therefrom at her expense, and that in the meantime all further proceedings against the applicant might be stayed.

The application was opposed by the plaintiff company, and was adjourned by his Lordship into Court.

A. R. Kirby, for the applicant. The case of *Moore* v. *Peachey* (1) may be relied upon as shewing that this application is an attempt to evade the giving of a deposit as required by the Rules of the Supreme Court, 1883, Order XXXI., r. 26; but that case is in truth an authority in the applicant's favour, as it shews that where there is no attempt at evasion an application similar to the present one is justified by the rules. It is true that in that case the documents were referred to in the affidavit in answer to interrogatories, whereas here they are referred to in the affidavit as to documents; but rule 26 applies to both alike. But, apart from authority, it is submitted that the rules themselves justify this application. Rules 14 and 15 are perfectly general in their terms. Rule 15 gives to "every party to a cause or matter" a right to require "any other party in whose pleadings or affidavits reference is made to any document" to produce such document for his inspec-

(1) [1891] 2 Q. B. 707.

tion. Rule 17 is framed in the alternative, and plainly contemplates that under rules 15 and 16 an application may be made as to documents referred to in the affidavit of documents as well as to other documents. The language of rule 18 (2.) is similar, and provides that "any application to inspect documents, except such as are referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents" is to be founded upon an affidavit. There is nothing in the other rules of Order XXXI. to qualify the generality of rules 15 to 18, and rule 18 (2.) would alone be sufficient even if the others were to be read in a limited sense. If this defendant had applied under rule 12 the plaintiffs might have objected that they had already made a sufficient affidavit. The judgment of Bowen L.J. in *Quilter* v. *Heatly* (1) shews the general character of the procedure under rule 14.

Mark Romer, for the plaintiff company. This is an attempt on the part of this defendant to obtain discovery from the plaintiffs without making the deposit required by rule 26. The Court in *Moore* v. *Peachey* (2) intimated a clear opinion that that ought not to be permitted. The deposit is intended to be a security to the party giving the discovery, not merely for the costs of the affidavit, but for the costs of producing the documents. Where the application is for general discovery of documents under rules 12 to 14, the deposit is required, and if the plaintiffs are now called upon to give general discovery of documents to this defendant (for that is what this application amounts to) they ought to be protected by deposit. The procedure under rule 15 and following rules is of an entirely different character from that under rules 12 to 14, and addressed to a different state of circumstances. It is confined, as was pointed out by Lindley L.J. in *Quilter* v. *Heatly* (3), to production of documents mentioned in the pleadings or affidavits, and the rules as to it "were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings." To bring documents

(1) (1883) 23 Ch. D. 42. (2) [1891] 2 Q. B. 707.
(3) 23 Ch. D. 50.

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within rule 15 it is submitted that it is not enough that they should be merely specified in a list contained in an affidavit, or, in the language of rule 18 (2.), merely "disclosed" in the affidavit of documents.

KEKEWICH J. This application was adjourned by me into Court because of its importance and novelty. It was admitted by counsel before me in chambers, and it is admitted here, that there is no direct authority upon the point. The action is for a declaration of the liability of the defendants in respect to certain shares. It is not necessary to go into the merits. It is enough to say that the action is so constituted that there are several defendants; one of them has obtained against the plaintiffs an order for discovery of documents, another defendant seeks to take advantage of the order, and, the order having been complied with and an affidavit of documents made, seeks to have produced to her, without any further affidavit of documents, the documents disclosed in the affidavit made on behalf of the plaintiff company. It is certainly strange that the point should not have arisen before; but, although it is one of some importance, I think now that I have had the advantage of argument on both sides I may safely say that it is not in terms provided for by the rules. They lay down a general practice, but are silent on this particular point. The first objection on behalf of the plaintiffs is that this is really an application for discovery; that upon such an application the applicant is bound to give security for costs—that is to say, to deposit 5*l.* unless the Court thinks it necessary to impose payment of a larger sum, and that this defendant is taking advantage of an application made by her co-defendant on paying 5*l.* without making any payment herself. It is said that is an evasion of the rule, and is a hardship on the plaintiffs in this case or the person making the affidavit, because costs will be incurred in producing these documents, and the rule is intended as an indemnity against the costs, not merely of making the affidavit, but also of production. If I saw any reason to suppose that there was any intention to evade the rule as to deposit, I should take the

course indicated by the judges in *Moore* v. *Peachey*. (1) I should protect the party against whom the application was made, and provide that there should not in fact be any evasion of the rule. But I think that the decision in *Moore* v. *Peachey* (1) is not an authority in Mr. Romer's favour. In that case interrogatories had been delivered, and the deposit of 5*l*. required by Order XXXI., r. 26, on an application for discovery of documents had been made. The affidavit in answer to interrogatories referred to certain documents, and the Court, consisting of Denman and Wills JJ., held that there was no occasion for the applicant there, seeking for inspection only, to make a further deposit. It is quite true that that case is distinguishable from the present case, because there the documents were referred to in the affidavit in answer to interrogatories, whereas here they are referred to in the affidavit of documents. But Order XXXI., r. 26, is applicable in each case, and I think that *Moore* v. *Peachey* (1) is a decision that, unless there is evasion of the rule as to deposit, there is no reason why there should be a further deposit in a case such as this. Then it is said that the rules do not meet this case, and may be read in a manner inconsistent with the right which is claimed. I think that is so. It is quite possible to read the rules and shew that there are many passages which point to this particular application not being within them. But I do not think that is enough. I think there are rules which sufficiently cover the point and enable me to make the order. In the first place, rule 12 of Order XXXI. enables the Court to refuse to make the order for discovery of documents when it is satisfied that there is no occasion for an affidavit of documents, and Mr. Kirby anticipates, and he has some reason for so doing, that if the defendant for whom he appears were to apply that an affidavit of documents should be made by the plaintiffs, they would say, and the Court would uphold them, that they had already made an affidavit of documents, and stated what documents were in their possession, and that they ought not to be asked to do that again even though a further deposit were paid. I am not sure that, if the

(1) [1891] 2 Q. B. 707.

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present application were to fail, Mr. Kirby's anticipation would prove to be well grounded; but I think it affords some reason for saying that the application ought not to fail. According to the general practice of the Court, a party ought not to be put to do what the Court refuses to order, and the Court would refuse to make an order for a further affidavit when a further affidavit was not necessary. Rule 14 is in very general terms: "It shall be lawful for the Court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just." Now we know by an affidavit—that is to say, by a document of record in this action—that the plaintiffs have in their possession or power certain documents. That cannot be contested. Why should the Court be powerless on the application of a defendant to make the order to which rule 14 points? It is quite true that there are other rules, beginning with rule 15, which deals with the particular case of documents to which reference is made in pleadings or affidavits, and these rules go on to provide that the party requiring the documents should give notice, and then under rule 18 the Court may make an order for production. It seems to me to be essential for the administration of justice that there should be power in the Court to prevent a further affidavit of documents being made, and on the application of a second defendant to order the plaintiff to produce to him the documents which in answer to the first defendant he has admitted to be in his possession or power. Surely I have good grounds for that jurisdiction. The words of rule 14 are clear and without qualification: "such of the documents in his possession or power relating to any matter in question" in the cause or matter "as the judge shall think right." But that, of course, means documents relating to the matters in question between the plaintiff making the affidavit and the defendant on whose application it is made. It is possible, and indeed every practitioner must know that

it is not at all an uncommon thing, that documents which are relevant to questions between the plaintiff and defendant A. are not relevant to questions between the plaintiff and defendant B. It is likely to occur where many defendants are sued on different grounds. I think it would be extremely hard to make a plaintiff produce to B. all the documents which he has admitted to be in his possession or power as against defendant A., notwithstanding that they may have nothing to do with the case between the plaintiff and B. The Court always guards against production and discovery of any documents which are not relevant to the matters in question. I think, therefore, that when a defendant, in the position of B., makes an application of this kind he can only do so on the terms that, notwithstanding the order, the plaintiff may be at liberty to withhold on oath or seal up documents not relating to the matters in question between the plaintiff and the particular defendant, and the order to be now made must be so framed.

Solicitor for applicant: *G. M. Folkard.*
Solicitors for plaintiffs: *Cheston & Sons.*

C. C. M. D.

KEKEWICH J.

1902

Dec. 11.

In re SMILTER.
BEDFORD *v.* HUGHES.

[1902 S. 3750.]

Will—Construction—Illegitimate Child.

A testator gave the proceeds of Blackacre upon trust for the children of his nephew George, "including amongst such children Samuel, the illegitimate son of my said nephew," and the testator elsewhere in the will recognised Samuel as his nephew's son. The testator then gave the proceeds of Whiteacre upon trust (in the events which happened) for such of eight named nephews and nieces (including George) as should be living at the death of his niece Mary, and the issue living at the death of his said niece of such of his other nephews and nieces as should die in her lifetime leaving issue. George died in the lifetime of Mary, leaving issue one illegitimate son, namely, Samuel. Upon the death of Mary:—

Held, that the illegitimate son was entitled to take under the latter gift.

W. L. SMILTER by his will dated April 9, 1880, devised certain freehold property in Bank Street, Sheffield, to trustees upon trust to pay the income thereof to his nephew George Francis Smilter during his life, or until he should assign or incumber the same or become bankrupt; and after the failure or determination of the trust lastly thereinbefore mentioned in the lifetime of his nephew he directed the trustees to pay and apply the same for the maintenance and personal support of "my said nephew George Francis Smilter and his wife and issue, whether children or more remote, for the time being in existence (including Samuel Smilter Revill hereinafter named)" during the life of his said nephew as therein mentioned, and subject thereto he directed his trustees to sell the property and hold the proceeds thereof "upon trust for all and every the children and child of my said nephew George Francis Smilter living at my death or born afterwards who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, and if more than one in equal shares, including amongst such children and child Samuel Smilter Revill, the illegitimate son of my said nephew." And the testator declared that, "if there shall be no child of my

said nephew, including the same Samuel Smilter Revill, living at my death or born afterwards who if a son shall attain the age of twenty-one years, or if a daughter shall attain that age or marry under that age," then the property should be held upon certain trusts for the benefit of eight named nephews and nieces and their issue. The testator then gave certain freehold and leasehold property in Regent Street, Sheffield, to his trustees upon trust to pay the income thereof to his niece Mary Smilter during her life, and subject thereto he directed his trustees to sell and hold the proceeds thereof upon trust for her children as therein mentioned, and in default of children upon trust for such of his nephews and nieces, the said George Francis Smilter and seven other named nephews and nieces, as should be living at the decease of his said niece Mary Smilter, and the issue living at the decease of his said niece Mary Smilter of such of his said other nephews and nieces as should die in the lifetime of his said niece Mary Smilter leaving issue in equal shares, such issue taking only their parents' shares.

The testator died on October 25, 1883. Mary Smilter died on February 4, 1902, without having been married. George Francis Smilter died in the lifetime of Mary Smilter in 1897, leaving issue only one illegitimate son, namely, Samuel Smilter Revill.

At the death of Mary there were living several nephews and nieces of the testator, and legitimate issue of deceased nephews and nieces, who were entitled to take under the gift over of the Regent Street property.

This summons was taken out by the trustees of the will to have it determined whether upon the true construction of the will the illegitimate son of George Francis Smilter was entitled to a share of this property.

Kenyon Parker, for the trustees.

R. J. Parker, for S. Smilter Revill. In the clauses of the will which precede the gift over now in question the testator has shewn that he includes this son in the class of children and issue of his nephew George Francis Smilter. In disposing of the Bank Street property he does not give to a class of

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SMILTER, *In re.* BEDFORD *v.* HUGHES.

children and issue and the illegitimate son, but says that he includes in the class of children and issue this son, who would otherwise not come within it. For the purposes of his will he has legitimised his son in three clauses. He, therefore, intends him to be included in the class in this gift over, although he is not there specifically mentioned: *In re Parker* (1); *In re Walker* (2); *In re Wood.* (3)

P. O. Lawrence, K.C., and *Everard*, for some of the legitimate relations entitled under the gift over. This case is like *Meredith* v. *Farr* (4), where a testator gave a sum of 300*l.* to be divided (in the events which happened) between the children of M. and the children of C., and then gave a second sum of 300*l.* to the children of C., "namely, William, John, Angelina, Sarah," and a third sum of 300*l.* to the children of M., "including Elizabeth." Three of the named children of C. and Elizabeth were illegitimate, and it was held that the three illegitimate children of C. were entitled to participate in the first gift, but that Elizabeth was not. In Jarman on Wills, 5th ed. p. 1090, the learned author in commenting on this case refers to the distinction between the words "namely" and "including." "'Namely,'" he says, "imports interpretation, i.e., indicates what is included in the previous term; but 'including' imports addition, i.e., indicates something not included." Here the testator has used the word "including," which denotes an addition to the class. He has not made a dictionary for himself, but has sought in particular gifts to import a stranger.

A. F. Peterson, for other parties in the same interest.

KEKEWICH J. In this case I think that there is sufficient indication of the testator's intention to include this gentleman as the son of his nephew. Before dealing with the will I may say that I entirely admit the accuracy of Mr. Lawrence's grammatical construction that including in a class a person who is not a proper member of the class is really tantamount to an addition. But I do not think that *Meredith* v. *Farr* (4)

(1) [1897] 2 Ch. 208.
(2) [1897] 2 Ch. 238.
(3) [1902] 2 Ch. 542.
(4) (1843) 2 Y. & C. Ch. 525.

proceeded upon that ground. There nothing turned upon the meaning of the word "including." In the first place, the question was not whether one particular child of Mary was to be let in, but whether two children of Mary—she had two illegitimate children besides several legitimate children—were to be let in. It would have been practically impossible to let in one without the other. That, I think, is reasonably clear. There there was first a gift among the children of Mary and Catherine, and it was upon that gift that the question arose; and then there was a second gift to the children of Mary, one of her two illegitimate children being mentioned in this way—"including her daughter Elizabeth." That was a different case from that which is now before me. But, further, one must remember this. That case was decided in 1843 by Knight Bruce V.-C., a judge, as we all know, of the broadest possible mind, and one who would have done his utmost to give effect to the testator's intention if he could do so without transgressing any principle. What he says is (1): "I think it would be too dangerous to let in the two illegitimate children under the first bequest." That rather implies that he desired to let them in if he could properly do so; but I think it also shews that at that time these references to illegitimate children were treated by the Court in an entirely different manner from that in which they are now treated. I take it that Lord Eldon would have said without hesitation that the word "children" had its ordinary meaning of children ex propriis nuptiis procreati unless there were words distinctly affirming the contrary. Of late years, however, there have been many cases, including the recent case of *In re Wood* (2), to which Mr. R. J. Parker referred, in which the Court has shewn an anxiety to give effect to the testator's intention in favour of those who are relations except in law, and has not hesitated to take hold of anything in the will which pointed in that direction. I think that there is enough to take hold of here on those lines. After giving an estate to his nephew George Francis Smilter for life, determinable upon his becoming bankrupt, the testator says that on the happening of that event the income is to be applied

(1) 2 Y. & C. Ch. 527. (2) [1902] 2 Ch. 542.

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"for and towards the maintenance and personal support of my said nephew George Francis Smilter and his wife and issue, whether children or more remote, for the time being in existence (including Samuel Smilter Revill hereinafter named)." The testator tells us afterwards what he means by "hereinafter named," because when he disposes of the property after the death of George Francis and gives it among his children he says, "including amongst such children and child Samuel Smilter Revill, the illegitimate son of my said nephew." He describes him there as a son, no doubt as an illegitimate son, but he recognises him as the son of his nephew, and says he is one of the children. It is true he does not say "for all the purposes of the will," but still it is a recognition by the testator of his status as son. Then there is a gift over, which is a little wanting in drafting accuracy, and in fact cannot be construed strictly, but it is not difficult to understand what it means. He says: "I declare that if there shall be no child of my said nephew, including the same Samuel Smilter Revill, living at my death or born afterwards," and so on. He means there: "If my nephew has no children living at my death or born afterwards, and in speaking of my nephew having no children I again recognise the fact that he has a child, and I include him." Then, when he comes to the gift over of the property given to his niece Mary for life, he speaks of the children of his nephews and nieces, including George Francis, and says nothing about the illegitimate child. But to my mind it approaches the inconceivable that he should not have intended that this gentleman, whom he had recognised as the son of George Francis, should take under this gift to the children of George Francis. He has not made a very good dictionary for himself, I admit; but I think that he has sufficiently indicated that this gentleman is the son of his father for all the purposes of the will.

Solicitors: *Geare & Pease, for Wake & Sons, Sheffield; Peacock & Goddard, for Henry Vickers, Son & Brown, Sheffield.*

H. B. H.

KEKEWICH J.
1902
Dec. 12.

In re ALPHA COMPANY, LIMITED. WARD *v.* ALPHA COMPANY.

[1902 A. 1499.]

Practice—Debenture-holder's Action—Right of Plaintiff to discontinue after Judgment.

The rule whereby the plaintiff in a creditor's administration action is precluded from discontinuing his action after judgment does not apply to a debenture-holder's action, the reason being that in a creditor's administration action the Court, by directing in the judgment that the estate shall be "applied in a due course of administration," takes upon itself the duty of administering the assets, whereas no such direction is contained in the usual judgment in a debenture-holder's action. Therefore, if the plaintiff in a debenture-holder's action has no notice that any other debenture-holder claims to have the benefit of the judgment, it is competent for him to discontinue his action.

Handford v. *Storie*, (1825) 2 S. & S. 196; 34 R. R. 272, n., considered.

ADJOURNED SUMMONS.

This action was brought on October 3, 1902, in the matter of the Alpha Company, Limited, by William Ward, on behalf of himself and all others the holders of mortgage debentures of the defendant company, as plaintiff, against the company as defendants, claiming as a debenture-holder of the defendant company a declaration that the mortgage debentures issued by the defendant company and then outstanding constituted a charge upon all the property of the company comprised therein, and all necessary accounts and inquiries, payment, foreclosure and sale, and the appointment of a receiver or manager.

On October 8, 1902, an order was made appointing a receiver and manager.

On October 21, 1902, judgment was given in the action directing an account of what was due to the plaintiff and the other holders (if any) of the mortgage debentures issued by the defendant company under or by virtue of the said debentures; an inquiry of what the property comprised in the debentures consisted, and in whom the same was vested; and usual

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inquiries as to other incumbrancers and their priorities; and it was ordered that the further consideration of the action be adjourned to the judge in chambers, and any of the parties were to be at liberty to apply as to a sale or realization out of Court if advisable of the property comprised in or charged by the debentures, and generally.

The plaintiff was the holder of five debentures created by the defendant company for 1000*l.* each. Previously to the commencement of the action four of these debentures were paid off, and on November 19, 1902, the receiver and manager paid to the plaintiff the moneys due to him on the remaining debenture out of moneys produced by realization of the assets of the company.

This summons was taken out by the company asking that all proceedings in the action might be stayed. On the hearing in chambers the question was raised whether the rule which prevails in creditors' actions was applicable so as to preclude the plaintiff from discontinuing the action after judgment.

By the affidavit of the receiver and manager in support of the summons it was stated that no debentures had been created by the company other than those issued to the plaintiff.

Talbot Crossfield, for the company.

Martelli, for the plaintiff. The case of *Handford* v. *Storie* (1), which is referred to in Seton on Judgments, 6th ed. p. 1396, and Daniell's Chancery Practice, 7th ed. pp. 1669, 1670, as though it were a creditor's administration action, was in fact an action by a debenture-holder having a charge on a landed estate, and suing on behalf of himself and all other debenture-holders having similar charges for an account and payment, and the language of Leach V.-C. seems to shew that the rule which obtains in creditors' administration actions applies to a class action of this kind, and that although the plaintiff is dominus litis before judgment, he ceases to be so after the judgment, and cannot deprive other members of the same class of the benefit of it. In the present case, as the plaintiff has been paid off, and there is evidence shewing that there are in fact no other

(1) 2 S. & S. 196; 34 R. R. 272, n.

debenture-holders, it is competent for the Court to stay proceedings on the application of the company.

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KEKEWICH J. This is a point of novelty, and I am not aware of any authority upon it. Mr. Martelli has found one case bearing on it—namely, *Handford* v. *Storie* (1); and his industry is the more commendable because from the note of that case in Seton on Judgments, 6th ed. p. 1396, it would appear that it was an administration action, when in fact it was not an action of that character. The plaintiff here sues on behalf of himself and all others the holders of mortgage debentures of the defendant company, and he has obtained a judgment in the common form in a debenture-holder's action directing an account of what is due to the plaintiff and the other debenture-holders (if any) with consequential inquiries. Mr. Martelli says that although he has sued in that way he really is not one of several debenture-holders, but is the only one. There is some evidence to that effect, but I am not prepared to accept that. I do not think it is sufficient to justify me in treating this as being other than what it is in form, namely, an action by a debenture-holder on behalf of himself and other debenture-holders. There has been this judgment, and now the plaintiff wishes to discontinue his action, and the question is whether he is entitled to do that after judgment, and in view of the novelty of the point I had the matter adjourned into Court. The action has been likened to an administration action by a creditor, suing on behalf of himself and all other creditors, against an executor or administrator for administration. I do not pause to distinguish between an action by a specialty creditor, or any other particular class of creditor, but I take the simple case. The creditor who is plaintiff obtains a judgment. The moment he has done that, if it is a proper judgment, he cannot possibly stop, not for the reason assigned in argument, but for this reason—namely, that if it is a proper judgment it not only directs inquiries as to debts, &c., but also that the assets shall be applied "in a due

(1) 2 S. & S. 196; 34 R. R. 272, n.

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course of administration." It is perfectly well settled that if there is not that direction as to the administration of assets the decree is not an administration decree in the proper sense of the term, and actions at law cannot be restrained. But if that direction is given, they can be restrained, and for the reason that the Court has then taken upon itself the duty of administering the assets. The Court, having undertaken that duty, will not allow the assets to be wasted by creditors outside. The other creditors must trust the Court, and if they will not do so, they must be stopped. Therefore, in a case like that, until there is a certificate that all the other debts have been paid, the plaintiff after decree is not dominus litis; he is, so to speak, a trustee of the action for the benefit of the other creditors.

That is so in the case of a creditor's administration action, but a debenture-holder's action seems to me to be entirely different. The debenture-holder here no doubt sues on behalf of all other debenture-holders. That is because he is one of a class. There may be an action on behalf of the plaintiff and all other persons interested in a particular property, and there are many other cases in which a person may sue as representing a class. Then the plaintiff has got a judgment, but he has not undertaken, and the Court has not undertaken, the administration of the estate. It is no doubt expected that the Court will have the supervision of it, but not by way of duty, because there is nothing amounting to a direction for administration in due course as in the administration decree. It was said that the old case of *Handford* v. *Storie* (1) was a debenture-holder's action. It was not a debenture-holder's action such as we know it at the present day. The debentures were by conveyance of estates to trustees to raise money by giving debentures, and, being entitled to rank under the charge which was so created, the plaintiff brought an action on behalf of himself and all other holders of such debentures for an account and payment, and before decree he sought to have the suit dismissed, and Leach V.-C. said this (2): "A plaintiff

(1) 2 S. & S. 196; 34 R. R. 272, n.

(2) 2 S. & S. 198.

who sues on behalf of himself and all other persons of the same class, as he acts upon his own mere motion and at his own expense, retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure. After a decree he cannot, by his conduct, deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it." No more can this plaintiff. He cannot deprive them of the benefit. He may take proceedings if he chooses, but there is no duty cast on him to go on. He cannot prevent another debenture-holder coming in and claiming the benefit of the action, but he is not bound to go on because some other person may be entitled to the benefit of the action. Therefore I am not hampered by that language of the Vice-Chancellor; but then he proceeds to say this: "The reason of the distinction is, that before decree no other person of the class is bound to rely upon the diligence of him who has first instituted his suit, but may file a bill of his own; and that, after a decree, no second suit is permitted." No more it is now. When a debenture-holder's action has been commenced before me, another debenture-holder is not allowed to commence a similar action here or elsewhere. In order to prevent this being done, every action of this kind is now entitled in the matter of the company, so that solicitors can search and find whether such an action has been commenced. But if by inadvertence or otherwise a second action were instituted, it would be stopped, not because the Court has undertaken a duty, but because it is exercising its jurisdiction to prevent improper costs. That was always the case in administration actions before debenture-holders' actions such as this were thought of. I think that is all the Vice-Chancellor meant—that after decree no second suit could be brought, not because the Court had undertaken the duty of administering the assets, but because for the furtherance of justice and prevention of costs the second action would not be allowed to go on if the first was sufficient for all purposes. I see no reason why this plaintiff, although he is suing on behalf of himself and all other debenture-holders, not having notice of any claim, and not being required to go on by another debenture-holder, should not discontinue his action. What

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would happen if some other debenture-holder applied, I need not say, but I do not see how he could be excluded. But here there is nothing of that kind. The plaintiff remains master of the position, and may discontinue his action.

Solicitors: *Burton, Yeates & Hart, for Glaisyer, Porter & Tangye, Birmingham; Alfred Double.*

C. C. M. D.

BYRNE J. 1902 *Nov.* 29.

In re THE LORD MAYOR OF SHEFFIELD AND THE TRUSTEES OF ST. WILLIAM'S ROMAN CATHOLIC CHAPEL AND SCHOOLS, SHEFFIELD.

[1902 S. 0142.]

Charity—Sale of Land—Purchase-money in Court—Payment out—Trustees with Power of Sale—Persons absolutely entitled—Consent of Charity Commissioners—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 69—*Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 17.

Trustees of a charity, who have power with the consent of the bishop to sell the charity land and to give a full discharge for the money paid therefor, are persons "absolutely entitled" within s. 69 of the Lands Clauses Consolidation Act, 1845; and the purchase-money of land of the charity, which has been paid into court under that Act, can be ordered to be paid out to them without the consent of the Charity Commissioners.

PETITION.

By an indenture of April 16, 1863, leasehold premises situate at Hawley Croft, Sheffield, with a school and other buildings thereon, were assigned to trustees for the residue of a term of 800 years created in 1720, upon trust to permit the school-house and other buildings, or such part thereof as they should think fit to be used as a residence for a schoolmaster or schoolmistress or both, and to permit the school-house to be used for a Roman Catholic week-day school for the religious and secular education of young persons, with power, with the consent in writing of the Roman Catholic bishop of the district for the time being, to sell the school-house and buildings, or any part thereof, and to give a full discharge for the purchase-money paid therefor.

The corporation of the city of Sheffield, acting as the urban district council of the city of Sheffield, under the powers of the Housing of the Working Classes Act, 1890, the Local Government Boards Provisional Orders Confirmation (Housing of the Working Classes) Acts (No. 2), 1894 and 1898, and the Lands Clauses Consolidation Act, 1845, agreed with the trustees for the purchase of the above-mentioned leasehold premises for the residue of the term at the price of 1500*l.*, to include all claims of compensation for loss, injury, or damage sustained by the trustees, this sum being the value assessed by two surveyors nominated as required by the Lands Clauses Consolidation Act, 1845. On October 3, 1902, the corporation paid the purchase-money into court under s. 69 of the Lands Clauses Consolidation Act, 1845, and on October 8 the premises were conveyed to them.

The trustees presented this petition, alleging that they were absolutely entitled to the 1500*l.* in court, and were desirous that it should be paid out to them, to be held upon the trusts of the deed of April 16, 1863; and they prayed that the money might be paid out to them accordingly.

The petition was served upon the corporation only.

Kenyon Parker, for the petitioners. The trustees wish to have the money paid to them in order to rebuild the schools. Under s. 69 of the Lands Clauses Act, 1845, the Court can order the money to be paid out to "any party becoming absolutely entitled to such money." Trustees of a charity with power to sell the land are persons "absolutely entitled" within that clause; therefore the consent of the Charity Commissioners under s. 17 of the Charitable Trusts Act, 1853, is not required: *In re Spurstowe's Charity.* (1) It is, however, suggested that the law has been altered since that decision, and that their consent is now necessary: Tudor's Charitable Trusts, 3rd ed. pp. 281, 282; or, at all events, that it is a question for the discretion of the Court: *In re Smith.* (2)

[BYRNE J. referred to Bourchier-Chilcott's Administration of Charities, 2nd ed. p. 26.]

(1) (1874) L. R. 18 Eq. 279. (2) (1888) 40 Ch. D. 386.

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SHEFFIELD CORPORATION AND TRUSTEES OF ST. WILLIAM'S ROMAN CATHOLIC CHAPEL AND SCHOOLS, SHEFFIELD, *In re.*

In *In re Hobson's Trusts* (1) it was held by the Court of Appeal that trustees of a settlement with power of sale were persons "absolutely entitled," and that decision was not overruled by *In re Smith.* (2)

R. J. Parker, for the corporation, made no objection to the money being paid out to the trustees, but pointed out that the power of sale was only exercisable with the consent of the bishop.

BYRNE J. In the case of *In re Morgan* (3) Stirling J. points out that *In re Hobson's Trusts* (1) has not been overruled; so I must treat it as a binding authority. It follows from that that the petitioners are absolutely entitled, and that the consent of the Charity Commissioners is not required. I will make the order as prayed.

Solicitors: *Geare & Pease, for Wake & Sons, Sheffield; Richard F. & C. L. Smith, for the Town Clerk of Sheffield.*

(1) (1878) 7 Ch. D. 708. (2) 40 Ch. D. 386.
(3) [1900] 2 Ch. 474.

H. C. R.

BOURNE *v.* SWAN & EDGAR, LIMITED. *In re* BOURNE'S TRADE-MARKS.

FARWELL J.

1902

Nov. 10, 11, 12, 13, 14.

[1901 B. 1915.]

Trade-mark—Old Mark—Registration—Lapse—Re-registration—Action for Infringement—Passing off Goods—Advertisements and Circulars—Motion to expunge Trade-mark—Delay—Costs—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 54, 64, 77 (*a*), 79, *and* 90—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 18.

A trade-mark may be infringed by being used in the advertisements and circulars of a rival trader, if it is used in them in relation to or connection with the same class of goods, and in such a manner as to be calculated to deceive.

Delay in moving to rectify the register by expunging therefrom a trade-mark will as a general rule deprive a successful applicant of his costs; but he may be refused relief altogether if his delay has placed the respondent at an unfair disadvantage, e.g., if material evidence has been lost to the respondent by reason of the delay.

A. was the owner of two trade-marks. One was the figure of a "Swan," with adjuncts, and the other was the word "Swanbill." Both marks were registered as old marks in 1876 in respect of the same class of goods, and for many years were used together. In 1890 A. per incuriam allowed the registration of the word "Swanbill" to lapse, but in 1892 registered it again as an old mark. In 1901 he brought an action against B. & Co. for infringing his trade-mark of a "Swan" in their advertisements and circulars; and thereupon they moved to expunge both of A.'s marks from the register. They had become aware in 1896 of the registration in 1892 of the word "Swanbill." The action and motion were tried together, and at the trial B. & Co. abandoned their motion so far as it sought to expunge A.'s trade-mark of a "Swan," but succeeded in expunging the word "Swanbill." The action was dismissed. Under the circumstances, and having regard to B. & Co.'s delay in moving to rectify the register, A. was ordered to pay only two-fifths of the taxed costs of the action and motion.

In re Talbot's Trade-mark, (1894) 11 Rep. Pat. Cas. 77, followed.

An application by A. for a certificate under s. 77 (*a*), on the ground that the validity of his trade-mark of a "Swan" had come in question, was refused.

Observations on the distinction between a passing-off action and a common law action for deceit.

London General Omnibus Co. v. *Lavell*, [1901] 1 Ch. 135, commented on.

THE plaintiff, Addley Bourne, carried on the business of a ladies' outfitter and hosier in Sloane Street, S.W., and was the

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registered proprietor of the trade-mark No. 4999 in class 38 in respect of ladies' corsets and baby linen. This mark consisted of the figure of a swan with two cygnets on a background of bulrushes. He was also the registered proprietor of the trade-mark No. 169,313, also in class 38, in respect of ladies' corsets and baby linen. This mark consisted of the word "Swanbill." Both marks had originally been registered by the plaintiff's father, his predecessor in the business, in the year 1876 as old marks, i.e., as having been used for more than two months prior to August 13, 1875, and had ever since been used together in connection with ladies' corsets and baby linen by the plaintiff and his father. The business at one time was carried on in Piccadilly, but in the year 1890 was moved to Sloane Street. In this year the plaintiff by inadvertence allowed the registration of the mark No. 169,313 to lapse. He first became aware of his mistake in the year 1892, and at once, on December 13, 1892, registered it again as an old mark, i.e., as having been in use for two months prior to August 13, 1875.

The defendants, Swan & Edgar, Limited, had for many years carried on at Piccadilly a business similar to that of the plaintiff, and habitually used the figure of a swan in various classes of goods, and also about their premises and in their advertisements and circulars. In the year 1896 the plaintiff complained that they were infringing his trade-marks; some correspondence passed, and the defendants, without admitting they had done wrong, discontinued the particular thing then objected to. In April, 1901, the defendants advertised their corsets in the newspaper called the *Ladies' Field*, and under the illustration of a corset, which they called the "Swan Corset," they placed and advertised the figures of two swans. They also issued large numbers of advertisements and circulars containing illustrations of their "Swan Corset" with the figures of two swans beneath. Thereupon the plaintiff commenced this action, alleging that the defendants were infringing his trade-mark No. 4999, and claimed an injunction and other usual relief. The defendants denied infringement, and gave notice of motion under s. 90 of the Patents, &c., Act, 1883, to

rectify the register by expunging therefrom both the plaintiff's trade-marks on the ground—as to the mark No. 4999, that it had been abandoned; and as to the mark No. 169,313, that it was not special and distinctive of the plaintiff's goods, and was when registered, and had for many years past been, in common use, and was understood by the trade and public, when used in connection with corsets, to denote a corset with a particular shape of busk. The action and motion were tried together. The evidence is sufficiently noticed in the arguments and judgments. It was admitted that the defendants had acted in good faith; and in the action no evidence was adduced of any one having been deceived.

Jenkins, K.C., and *Peterson*, for the plaintiff. On a motion to expunge, the burden of proof is on the defendant.

Upjohn, K.C., *Sebastian*, and *T. J. Tomlin*, for the defendants. We abandon the motion to strike out the mark No. 4999. As to the other mark, which consists of the word "Swanbill," the old registration was abandoned. There were two years in which no mark was on the register. In 1892 the plaintiff registered the mark as an old mark used before 1875, under s. 64 of the Act of 1883, which permits the registration of a "special and distinctive" word. That definition is wider than those contained in the subsequent Acts, but it precludes a word which is descriptive of a particular kind of goods generally sold in the trade: Sebastian on Trade Marks, 4th ed. pp. 45 et seq. The defendants are in the same trade as the plaintiff, and are "persons aggrieved" within s. 90 of the Act of 1883: *Richards* v. *Butcher* (1); *Powell* v. *Birmingham Vinegar Brewery Co.* (2) On the evidence the word "Swanbill" was, at the time of the registration, not special and distinctive of the plaintiff's corsets, but was well known to the trade as descriptive of a corset with a particular shape of busk. The only advantage which a man gets by applying to register a mark used before 1875 is that he need only prove that the word used was special and distinctive, instead of being "a fancy word," or an invented word, as required by the later Acts. But it must be special

(1) [1891] 2 Ch. 522. (2) [1894] A. C. 8.

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and distinctive at the date of registration, and not merely when the user commenced: *In re Hyde & Co.'s Trade-mark.* (1) Lastly, if an applicant wishes to get the benefit of an old registration, which has been allowed to lapse by mistake, he must apply to have it restored under s. 79, sub-s. 4, of the Act of 1883; but this the plaintiff did not do.

Jenkins, K.C., for the plaintiff. The delay of the defendants is a sufficient answer to this motion. Apart from the general notice given by the fact of our mark being on the register, we wrote to the defendants in 1896 claiming the exclusive right to the word "Swanbill," and they agreed to withdraw the label we then objected to. Mere delay might not be sufficient, but the general principles of the Court in specific performance actions and applications to rectify the register of a company, with regard to persons sleeping on their rights, apply to trade-mark cases. If a man stands by and allows the position of another to be prejudiced by his delay, the Court will not interfere. An applicant to rectify the register must come promptly: *In re Hyde & Co.'s Trade-mark.* (1) We are specially prejudiced by the delay because we have spent considerable sums in advertising, and the lapse of time makes it more difficult to prove our user before 1875. The application to strike off this mark is not made by way of defence: it is not the same mark as that which the defendants are charged with infringing. Delay has been held a good ground for the Courts refusing to interfere in a passing-off case: *Beard* v. *Turner.* (2) It must also be a good ground for refusing an application to rectify the register.

[*Upjohn, K.C.* It is the duty of the Court to protect the purity of the register: *In re Talbot's Trade-mark* (3); *Paine & Co.* v. *Daniell & Sons' Breweries.* (4)]

Every case must depend on the facts. The Court has a discretion, and will not interfere where the respondent has been prejudiced by delay.

The grounds given for striking off this mark are that it is

(1) (1878) 7 Ch. D. 724.
(2) (1865) 13 L. T. 746.
(3) 11 Rep. Pat. Cas. 77.
(4) [1893] 2 Ch. 567, 584; 10 Rep. Pat. Cas. 217.

descriptive and was common to the trade. The first objection is not fatal to a mark used before 1875: *Benjamin Edgington, Limited* v. *John Edgington & Co.* (1); *Ransome* v. *Graham.* (2) A word used as an old mark is only bad if it is wholly and merely descriptive as "Nourishing Stout," or is only the common name of a manufactured article as "Valvoline" in *In re Leonard & Ellis' Trade-mark.* (3)

Our mark was good when it was first put on the register in 1876, and there has been a continuous and uninterrupted user ever since some period prior to August 13, 1875. There has been no abandonment: the lapse of the registration for two years was purely an accident arising from a change of address and the omission to forward the registrar's notice.

R. J. Parker, for the Comptroller of Patents. There is a difference between an application to restore and an application to re-register a mark. The latter is really an application for a new registration, and the authorities shew that at the time of registration the mark must be special and distinctive of the applicant's goods: *In re Wood's Trade-mark* (4), per Fry L.J. The important date is the date of registration. On the evidence the plaintiff could not register this mark on December 13, 1892, as a new mark, nor could he then register it as special and distinctive of his goods, because it was descriptive of and used in the trade to denote a corset with a particular shape of busk. He should have applied under s. 79 to restore.

Upjohn, K.C., in reply, referred to *In re Palmer's Trade-mark* (5); *Thompson* v. *Montgomery* (6); *In re Deeley's Patent* (7); *In re Batt & Co.'s Trade-mark* (8); *In re Hill's Trade-mark.* (9)

Nov. 13. FARWELL J. This is a motion to rectify the register. The plaintiff is the owner of two trade-marks. With regard to the pictorial trade-mark of a "Swan," to which the notice of motion relates, particulars were given which put the

(1) (1889) 6 Rep. Pat. Cas. 513.
(2) (1882) 51 L. J. (Ch.) 897.
(3) (1884) 26 Ch. D. 288.
(4) (1886) 32 Ch. D. 247, 262.
(5) (1883) 24 Ch. D. 504.
(6) (1889) 41 Ch. D. 35.
(7) [1895] 1 Ch. 687.
(8) [1898] 2 Ch. 432; 15 Rep. Pat. Cas. 534.
(9) (1893) 10 Rep. Pat. Cas. 113.

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application on the ground that it had never been used for the goods in respect of which it was registered. Mr. Upjohn very properly admitted that he could not prove the totality of his particulars; that is to say, he could not prove that it had not been used for ladies' corsets. Inasmuch as he had given particulars in that form, and Mr. Jenkins was not prepared to deal with the point whether it had not been used with regard to certain other underclothing, it appeared to me that I ought not to allow the particulars to be departed from; and Mr. Upjohn very properly abandoned his point on that, and that part of his motion goes. As regards the second point, the trade-mark "Swanbill," questions of difficulty have arisen. This trade-mark is No. 169,313, and is said to have been "used by applicant and predecessor in business for two months before August 13, 1875." Now the history of this trade-mark is a little singular. The plaintiff's father in the year 1875 put upon the market corsets with busks which were introduced from France and were known as busc-à-poire, or busc-de-poire, from their shape. Having put those upon the market, he found a name, which was suggested to him by the shape, "Swanbill," and he called his corsets with those pear-shaped busks "Swanbill." The name "Swanbill" was at first used for corsets with pear-shaped busks only, and, as one of the witnesses said, "The original busc-à-poire I introduced to the plaintiff's father, and he invented the word 'Swanbill' to describe a busk of that shape, or a corset containing such a busk." The shape is indicated by the name, as is correctly stated in *Myra's Journal*. The name had a great success, and the plaintiff's father subsequently took to selling corsets with straight busks, as well as those with pear-shaped busks, under the name of "Swanbill Corsets." On December 13, 1876, which was the date of the application for registration by the plaintiff's father of the word "Swanbill"—it appears in the *Trade Marks Journal* for February 14, 1877, with the word "Swanbill"—it was registered as a mark which had been in use two months before August 13, 1875. At this date, therefore, there is a trade-mark "Swanbill" registered in respect of corsets and underclothing, and duly on the register. The plaintiff succeeded his father in the year 1885. The father

died in the year 1895. In 1890, through circumstances which I need not enter into, and which I think were very unfortunate for the plaintiff, and I cannot say he was to blame in any way —he happened to remove his business from Piccadilly to Sloane Street, and his letters did not reach him—the fourteen years expired, at the expiration of which, in order to keep his trade-mark alive, he had to make certain payments to the Patent Office. Notices were sent him in accordance with the requirements of the Act, but he never received them. He did not find it out for nearly two years, but directly he found it out he went to the Patent Office and asked what he had better do. It appears to me that the course he adopted, in accordance with the suggestions of the officials there, was really the only course open to him under the Act. There are provisions in the Act which enable a person, who per incuriam has let the time for payment elapse, to get re-registration, but he is limited in time, and this limit had been exceeded when the plaintiff applied; so that the only course open to the patent officials was to do as they did, and to register this as a new registration and not as a re-registration. Now the question arises, What is the effect of that? It is settled by *In re Wood's Trade-mark* (1) that the Court must be satisfied that the word is a special and distinctive word within the meaning of the second clause of sub-s. 3 of s. 64 of the Patent Act, 1883, at the date of registration. Lindley L.J. says (2): "I observe in passing that the expression 'used as a trade-mark before the passing of this Act' would not authorize, in my view at all events, the registration of that which was not a distinctive mark at the time of registration. You must have the two things, the distinctive mark as a trade-mark at the time of registration, and it must have been used previously to the passing of the Act." And Fry L.J. says (3): "It appears to me that to satisfy the requirements of that definition the word or words must be distinctive in this sense, that they distinguish the manufacture of the person who has registered the trade-mark from the manufacture of all other persons. I say 'manufacture,' but of course there may be cases in which they distinguish, not the

(1) 32 Ch. D. 247. (2) 32 Ch. D. 259. (3) 32 Ch. D. 262.

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manufacture, but the selection, or some other operation, upon the goods. But in all cases the word or words must distinguish the product of the person claiming the trade-mark from the product of all other persons; and it appears to me that it must have that distinctive character at the time of the registration. Then there is a further requisite, that such distinctive word or words must have been used as a trade-mark before the passing of the Act." I prefer the language of Fry L.J. as being perhaps a little more accurate than that of Lindley L.J., because he points out in that last phrase that I have read that there are two requirements—(1.) that it has to be special and distinctive, and (2.) that it has to be used as a trade-mark. Now in this case, leaving out all the prior history, and dealing with the case only on the evidence before me as to what was the use of the word "Swanbill" in 1890, 1891, and 1892, I have not the smallest hesitation in finding that the word "Swanbill" was not then special and distinctive. In fact, there was a body of testimony of most unusual weight and volume given on behalf of the applicants by persons from most of the largest houses in London and one or two at Brighton, the net result of which was to shew that the word "Swanbill" in 1890, 1891, and 1892 meant a corset with a busk of a particular shape, that it referred solely to the shape of the busk, that it was in common use in the trade, was used by customers in that sense, and did not distinguish the make or get-up of any particular person. This is the net result of the evidence I have heard, and I have not any hesitation whatever in finding that to be the fact. In the face of that finding, it appears impossible to me, however much I regret to deprive the plaintiff of the trade-mark which he has had on the register now for some years, to hold that he has fulfilled the requirements of the Act. There is no question of passing off on this motion, although the evidence which I have heard would have been relevant to passing off, but it has not been adduced for that purpose at all. It is evidence which shews that it was not a distinctive word in 1892, but a word which was in common use. Therefore, down to this point it seems to me clear that the registration cannot be supported. But it was said that there

was some assistance to be got from s. 79 of the Act. I regret to say I am wholly unable to see how that can be. I think Mr. Parker's argument was well founded. He put it in this way. There is a common law right that depends on the mode in which the words have been used and the meaning that they have to-day acquired. That is a question of evidence, and on the facts of the present case this right cannot be maintained. In addition to that the statute has given certain rights, and that statutory right depends on registration. But this depends on compliance with the requirements of the Act; and they have not been complied with so as to give any larger rights than arise under a registration in 1892.

The only remaining point, and one which impressed me at first, is the point of delay. It certainly is rather remarkable that, the new registration having been in 1892 and Mr. Addley Bourne's claim being brought to the attention of the applicants in 1896, they did nothing until 1901. They then, by way of retort to an action for infringing one trade-mark, brought this motion to rectify the register in respect of the two trade-marks. Delay, no doubt, may in some cases be sufficient to prevent the applicant from obtaining relief, but, so far as I can see, the only case in which the delay ought to have that effect would be when the respondent has been put to real disadvantage by the loss of his evidence, or the like. The right of the applicant is not a matter of his own concern alone, but, as Bowen L.J. said (1), "The purity of the register of trade-marks—if one may use the expression—is of much importance to trade in general, quite apart from the merits or demerits of particular litigants." Unless, therefore, the action or neglect of the applicants has put the respondent at some unfair disadvantage, it appears to me that his laches is sufficiently visited by punishment in the way of getting no costs if he should succeed. I think I should not be justified, particularly in the face of the decision of Stirling J. in the case of *In re Talbot's Trade-mark* (2), in refusing relief simply on the ground of delay. In that case the registration was in 1886, the first complaint by the applicant was in 1890, and he did not give his notice of

(1) [1893] 2 Ch. 584. (2) 11 Rep. Pat. Cas. 77.

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motion until December, 1893—that is, seven years after registration and three years after knowledge of such registration. The lapse of time here is very little different, and, so far as I can see, has not in any way prejudiced the respondent on the evidence which he has been able to put before the Court, or the matters which have been brought to my attention. It has been argued that there are considerations to which the Court should give weight derived from the general principle which the Court applies in cases of specific performance and actions of that sort. With all respect to Mr. Jenkins' argument, I do not think that is a true analogy. A specific performance action is merely the application of the equitable remedy under the concurrent jurisdiction of this Court to the common law right. The refusal of the equitable remedy of specific performance had no effect on the legal remedy which the plaintiff had at common law; but an application under this section is for a statutory remedy, and is made only under the statute and in the course pointed out by the statute. There is no question of equitable remedy under the concurrent jurisdiction. It is the sole exclusive remedy given under the statute. No considerations of the rights of third persons arise except as against the person who is on the register, because he is claiming a monopoly to the exclusion of the public at large; and if, as Bowen L.J. says, the Court finds out in the course of the case that the mark is wrongly on the register, however great the demerits of the applicant, the Court is bound to set the register right for the benefit of the public at large. I must therefore make an order rectifying the register; but I cannot strike out the mark altogether. The mark is registered "for ladies' corsets and other ready-made underclothing." The only evidence I have heard is with regard to corsets, and I only strike out the mark as regards corsets. It will read, "as regards ready-made ladies' underclothing other than corsets"; and certainly under the circumstances I shall follow the decision of Stirling J. in *In re Talbot's Trade-mark* (1) and give no costs.

R. J. Parker asked for the comptroller's costs.

(1) 11 Rep. Pat. Cas. 77.

FARWELL J. (after some discussion). I really do not know that one party is more to blame than the other. I must divide the costs. The comptroller will get his costs in equal moieties from each party.

The action was then taken.

Jenkins, K.C., and *Peterson*, for the plaintiff. This is not an action for deceit, but a passing-off action, and evidence of any person having been deceived is unnecessary. The plaintiff's trade-mark of a swan is not identical with the swans of the defendants', but substantially they are the same. The Court will compare the one with the other, and consider whether there is a reasonable probability of deception: *London General Omnibus Co.* v. *Lavell* (1); *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (2); *Payton & Co.* v. *Snelling, Lampard & Co.* (3)

Upjohn, K.C., *Sebastian*, and *T. J. Tomlin*, for the defendants. The plaintiff is not entitled to the exclusive use of a swan. The defendants are perfectly honest traders, and have used a swan for years in and about their shops and for various classes of goods, and in their catalogues and price-lists. The plaintiff must shew that the defendants' goods are so got up as to be calculated to deceive. Nobody has been deceived. The Court will look at the plaintiff's and the defendants' pictorial figures as a whole. There is no real similarity between them, and, besides, the defendants are simply using the figures of two swans as a decoration, and not as any indication of the origin of the goods. Further, this case differs from previous trade-mark cases in two respects: (1.) This is not a case where the plaintiff has proved that his pictorial figure has given the name to his goods: his corsets were known by the word "Swanbill," and not by the figure of a swan; and (2.) there has been no user of the plaintiff's trade-mark as a trade-mark. User in advertisements or circulars cannot be such a user. There must be user on the goods; but the defendants' corsets do not

(1) [1901] 1 Ch. 135. (2) [1899] A. C. 83.
(3) [1901] A. C. 308.

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go out with a swan upon them. There is no direct authority that user in an advertisement is an infringement of a trade-mark, although, no doubt, it is an element to be considered.

Jenkins, K.C., in reply. *Jay* v. *Ladler* (1) shews that a trade-mark may be infringed by being used in advertisements and circulars. On the main question, the figure of a swan is an important element in our trade-mark and advertisements, and for twenty-five years we have had large sales with it. The defendants never used the figure of a swan in connection with corsets until 1896, and the correspondence that then passed was an assurance that they would not again use the figure of a swan in connection with corsets. They have, however, unconsciously been coming gradually nearer and nearer to us, and the Court should now prevent their user of this figure in connection with corsets. The Court has not to consider the trade, but the ultimate unwary buyer: *Upper Assam Tea Co.* v. *Herbert & Co.* (2) Under the circumstances, even if the plaintiff is wrong, the costs should be apportioned. We also ask for a certificate under s. 77 (*a*) that the validity of the plaintiff's trade-mark of a "Swan" has come in question: *In re Field & Co. Ld.* v. *Wagel Syndicate, Ld.* (3)

Upjohn, K.C., on the question of costs, referred to *Patching* v. *Barnett*. (4)

Nov. 14. FARWELL J. The plaintiff, Mr. Addley Bourne, is the proprietor of a trade-mark bearing the representation of a swan, either sitting or swimming on the water, with two cygnets, and a background of bulrushes. His action is to restrain Messrs. Swan & Edgar, Limited, who are ladies' outfitters, and manufacturers of and dealers in corsets and other underclothing and baby linen in Regent Street, from infringing his trade-mark, the infringement complained of being contained in their advertisements in the *Ladies' Field* and in their own catalogues, by the representation of a young lady, not otherwise than comely, with a corset, standing with

(1) (1888) 40 Ch. D. 649; 6 Rep. Pat. Cas. 136.
(2) (1889) 7 Rep. Pat. Cas. 183.
(3) [1900] 1 Ch. 651.
(4) (1881) 51 L. J. (Ch.) 74, 79.

her back to a mirror with two swans facing in opposite directions away from one another, holding in their bills a scroll or piece of ribbon with "The Swan Corset" imprinted upon it. The representation is obviously not an exact copy of the plaintiff's trade-mark, and I have, therefore, to consider the case as though it were an old passing-off action: the issue being, Is the picture of the defendants calculated to deceive so as to lead people to believe that the goods of the defendants are the goods of the plaintiff? The first point to be observed is that it certainly is not now, and since Lord Cottenham's decision in *Millington* v. *Fox* (1) never was in the old Court of Chancery or in the Chancery Division, necessary to prove fraud. It has been pointed out by many judges that the injury to the plaintiff is the same whatever the intentions of the defendant may have been; and there are cases in which the defendant either did not know of the existence of the plaintiff's mark when he originally took it, or honestly believed that he had not in fact done anything which could mislead the public. It is well established, therefore, that fraud is not necessary to the success of the plaintiff; and in this case it is only fair to say that there is not the smallest evidence of fraud, nor did Mr. Jenkins charge fraud in any part of his opening, or in anything that has been said in the course of the action. The second point is that it was not necessary in the old Court of Chancery, and is not now in the Chancery Division, in passing-off cases to prove that any person has actually been deceived. Of course the fact, if proved, that persons of ordinary intelligence have in truth been deceived, would be very material in assisting the Court in coming to the conclusion that the mark or the picture complained of was calculated to deceive; but even the evidence that one person has actually been deceived is not conclusive, as was held by Malins V.-C. in *Civil Service Supply Association* v. *Dean* (2), where he said in effect that the witness was really too foolish: qui vult decipi, decipiatur. If it was necessary to prove actual deception, there would be an end to all quia timet actions. In many of these cases the question arises when the plaintiff finds out that the defendant

(1) (1838) 3 My. & Cr. 338; 45 R. R. 271. (2) (1879) 13 Ch. D. 512.

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is just on the point of flooding the market with a number of labels put on goods which the plaintiff considers will interfere with his trade-mark or his rights. In that case there can be no actual deception, but the jurisdiction of the Court to interfere quia timet is well settled. That brings me to the third point, which is of some little interest now having regard to the recent decisions, and that is, what evidence is admissible. You prove neither actual fraud nor actual deception. What, then, have you to prove? It has been ruled by the House of Lords in the case of *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (1), and I think it must now be taken to be finally settled, that it is not a proper question to put to the witnesses—Is the picture or mark complained of calculated to deceive the public? The House of Lords have put it on the ground, and the Lord Chancellor especially has put it on the ground, that that question is the very issue which the Court has to determine. It appears to me that there is also another reason against the admissibility, and that is that I do not see how you can call any individual to give what is in truth expert evidence as to human nature, because what they are asked in this form of question is, not what would happen to them individually, but what they think the rest of the world would be likely to suppose or believe. They are not experts in human nature, nor can they be called to give such evidence, and, apart from admissibility, one cannot help feeling that there is a certain proneness in the human mind to think that other people are perhaps more foolish than they really are. I do not think that Carlyle is alone in his estimate of the intelligence of the majority of the inhabitants of these islands. Therefore that is ruled out as a matter of evidence. It only remains, then, to call the evidence of people who can say that they themselves would be deceived. Now, it is obviously extremely difficult to get any such evidence. People are reluctant to admit that they are more foolish than their fellows. The result is that unless it is left to the eyesight of the judge, to judge for himself, there is practically no evidence open to the plaintiff in an action of this sort. I

(1) [1899] A. C. 83.

have made these observations in consequence of the recent decision in the Court of Appeal in the case of *London General Omnibus Co.* v. *Lavell.* (1) But first of all I should like to refer to one or two of the cases which appear to me to settle conclusively that it is the eyesight of the judge that is the ultimate test. I have already referred to the decision of Malins V.-C. He disregarded the positive testimony of a lady, who said that she had been deceived, and said that, really looking at the two marks, it was impossible—nobody could have been. One of the earliest cases is that of *Houldsworth* v. *M'Crea* (2), before Lord Westbury. That was a case of copying a design under the Acts which were then in force, and his Lordship there said (3): "Now, in the case of those things as to which the merit of the invention lies in the drawing, or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity of the two things. Whether, therefore, there be piracy or not is referred at once to an unerring judge, namely, the eye, which takes the one figure and the other figure, and ascertains whether they are or are not the same." That was again followed by Lord Herschell in *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (4), which was also a design case, where he said (5): "It seems to me, therefore, that the eye must be the judge in such a case as this, and that the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other." That was followed again by Lord Halsbury in the recent case of *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (6), where he says: "For my own part, I should not have required such evidence in these days, because it is so common a thing for companies to amalgamate that when I found two well-known names associated together as that of a new company being brought out, I should have at once jumped to the conclusion, and so would everybody else, that the two companies were really amalgamating together

(1) [1901] 1 Ch. 135.
(2) (1867) L. R. 2 H. L. 380.
(3) L. R. 2 H. L. 388.
(4) (1889) 14 App. Cas. 550.
(5) 14 App. Cas. 555.
(6) [1899] A. C. 83, 85.

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and forming a new company." Vaughan Williams L.J. has commented on this by saying that the Lord Chancellor is referring to names which appeal to the ear and not to the eye. (1) Speaking for myself, with all respect, I, and I think the majority of the world would, agree with the poet, "Segnius irritant animum demissa per aures Quam quae sunt oculis subjecta fidelibus." However that may be, it seems to me, with all respect, that the criticism is no longer a sound one since the case of *Payton & Co.* v. *Snelling, Lampard & Co.* (2); that was a case of pictorial copying, and Lord Macnaghten says: "The judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness," which I take to mean that the judge is not to take the answers of any witness, on the very question that he is to try, to the surrender of his own judgment. Now, the case which has been several times referred to, and which has been thought to be in conflict with these cases, is *London General Omnibus Co.* v. *Lavell.* (3) I have carefully considered that case, and I have come to the conclusion that it really has no bearing whatever on passing-off cases. It is not for me to say whether the Court of Appeal were right or wrong in treating the action as a common law action for deceit; but that is what they did, and their judgment is based on the footing that it is an action for deceit. It appears not only in the head-note, but at the very beginning of the arguments the Lord Chief Justice interrupts counsel by saying, "What right has the London General Omnibus Company . . . . to bring an action for deceit without evidence of deceit?" He repeats it again in the judgment. He says the fact that "the two omnibuses so resemble one another that they might be mistaken one for the other was not sufficient evidence to support an injunction in an action for deceit." This is, of course, quite true of an action for deceit, but it has no application to passing-off cases. The distinction between common law actions for deceit and suits in equity against passing off, and the evidence required

(1) [1901] 1 Ch. 137. (2) [1901] A. C. 311.
(3) [1901] 1 Ch. 135, 137.

therein respectively is well settled: it is sufficient to refer to the judgment of Lord Westbury in the well-known case of *Edelsten* v. *Edelsten* (1)—a passing-off case, where he says (2): "At law the proper remedy is by an action on the case for deceit: and proof of fraud on the part of the defendant is of the essence of the action: but this Court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant, or that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief. Neither will the plaintiff be deprived of remedy in equity, even if it be shewn by the defendant that all the persons who bought from him goods bearing the plaintiff's trade-mark were well aware that they were not of the plaintiff's manufacture. If the goods were so supplied by the defendants for the purpose of being sold again in the market, the injury to the plaintiff is sufficient. Again, it is not necessary for relief in equity, that proof should be given of persons having been actually deceived, and having bought goods with the defendants' mark, under the belief that they were of the manufacture of the plaintiff, provided the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other." Lord Blackburn says very much the same thing in *Singer Manufacturing Co.* v. *Loog*. (3) It is perfectly obvious, therefore, to my mind that when the Court of Appeal were dealing with the case of *London General Omnibus Co.* v. *Lavell* (4) they were dealing with it as a common law action for deceit. If it were not so, it would be impossible that they could have excluded the consideration of the ocular comparison of the two omnibuses, having regard to the cases I have referred to in the House of Lords. They could not have overruled the three Lord Chancellors, and if they had done so they would themselves have been overruled by the subsequent decision of *Payton & Co.* v. *Snelling, Lampard & Co.* (5) That

(1) (1863) 1 D. J. & S. 185.
(2) 1 D. J. & S. 199.
(3) (1882) 8 App. Cas. 15, 29.
(4) [1901] 1 Ch. 135.
(5) [1901] A. C. 311.

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being so, I now come to consider this particular case, having regard to the facts which have been proved before me. The first observation is that the defendants are obviously honest. The name of the first defendant is Swan, and the firm has been in existence by itself and its predecessors, before it was turned into a company, for a great many years. The figure of a swan pervades their premises and their goods, and appears on their doormats, in their windows, on the lamp in front of their shop: "Swan" appears everywhere. Their cheques have the figure of the swan, their goods are marked with the figure of the swan. It is true that as regards corsets and most of the goods in the catalogue the picture of the swan is not put against them, but that appears to me to be really immaterial unless it can be used, and in this case it cannot be used, as an indicium of fraud. I have had the artist here, who explained to me how it came about that those two swans were drawn in the picture. It was his own idea entirely. He was given corsets with the word "Swan" stamped upon them; he accordingly thought that it would be a pretty thing to add to his picture two pictures of swans, and he has made a very pretty drawing. Those two swans, to my mind, do not suggest a trade-mark in any sort of way: they are mere embellishments, decorative additions to a pretty picture. In particular, they do not represent or call up any suggestion, to my mind at least, of the plaintiff's trade-mark: for at least twenty-five years last past, the plaintiff has never used his trade-mark of the swan without the addition of his other trade-mark "Swanbill" underneath it; the trade-mark which has become associated in the public mind with the plaintiff has been the combination of the two trade-marks, a swan with two cygnets and bulrushes at the back, with the word "Swanbill" underneath. Unless, therefore, the plaintiff can establish a title to the figure of a swan of every sort and description in every capacity, I do not see how he can succeed in the present case. I have already said, for the reasons that I have given, that I consider that I could not nonsuit the plaintiff because he has adduced no evidence that anybody has been deceived, or no evidence of any person who says that he or she would be

likely to be deceived. I do not consider that I should be at liberty to nonsuit the plaintiff on that ground, but that I am myself bound to judge for myself in looking at the two pictures; and, so looking, I cannot believe that any reasonable person, male or female, looking at that pretty picture of the defendants' in their advertisement and in their catalogues, would be led to suppose that it had anything whatever to do with the trade-mark of the plaintiff, used as it has been as a swan floating or swimming on the water, with the two cygnets and the bulrushes at the back and "Swanbill" underneath it. Mr. Sebastian suggested that it might be necessary for the plaintiff to shew that the defendants were using their swan as a trade-mark. I do not think that is so; but it certainly is an element to be considered in the case. I think the case which Mr. Jenkins referred to of *Jay* v. *Ladler* (1) probably displaces that, although the report is not very lucid. I do not think that it can be really necessary that the mark should be used by the defendants as a trade-mark. If you use the plaintiff's trade-mark as an embellishment, and do in truth by such embellishment deceive, you do wrong to the plaintiff, although you may say that you are not using it as a trade-mark. It is an element to be considered, and when you find that a figure of a swan, used as it is in the defendants' business in all sorts and manners, has been used also as a pictorial embellishment to an advertisement, and that this latter use is that of which the plaintiff complains, it is not immaterial to consider that there is no attempt to use it as a trade-mark.

The next point is the question of costs, and I confess to feeling some little difficulty about the division of the costs. I cannot accede to Mr. Jenkins' suggestion that the letters which passed in 1896 should cause me to deprive the defendants of their costs. What happened then in my judgment comes to this. The plaintiff complained of the particular swan which the defendants then put in their window. The defendants then did not think it worth their while to fight or contest the matter, and for the sake of peace, without making any admission, they said that they would take it away

(1) 40 Ch. D. 649; 6 Rep. Pat. Cas. 136.

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and not use it. The plaintiff says that he understood that to mean that they would not ever use a swan again. I find it impossible to put any such construction on the letters, nor in fact are the letters put forward as a contract. It is said that there is some representation. To my mind, it comes to nothing. I should be very sorry to prevent or to throw any obstacle in the way of people making reasonable concessions to their neighbours for the sake of peace, as I should be doing, if I were to mulct the defendants now by depriving them of costs because they made concessions for the sake of peace in 1896. The real difficulty that I feel is how to give practical directions to the taxing master, which will enable him to deal with the costs of the action and the costs of the motion which have been tried together. I have come to the conclusion that it is better for both parties that I should divide those two sets of costs, lumping them together. Having regard to what the Court of Appeal said was the duty of a judge of first instance in the case of *Patching* v. *Barnett* (1), to which I have referred, and to the decision of Kekewich J. in the case of *In re Pollard* (2), I consider that I have jurisdiction to divide the costs, now that I have the matter fresh in my mind and the state of the evidence and the issues to which it related, so as to save the parties from the great trouble and expense, and the taxing master from difficulties, and the Court—it may be not myself but some other judge—from the difficulty of reviewing the taxation. I therefore direct that the plaintiff do pay to the defendants two-fifths of the entire costs of the action and of the motion to rectify, treating them as a whole, and including in that the costs of the interlocutory motion which were made costs in the action. That I think does substantial justice, and I am quite sure that it is in mercy to the parties and to the taxing master to give such a direction.

The last point is that Mr. Jenkins has asked me for a certificate under s. 77 (*a*) that the plaintiff's trade-mark No. 4999 has come into question. I entirely accept Buckley J.'s decision in *Field & Co., Ld.* v. *Wagel Syndicate, Ld.* (3),

(1) 51 L. J. (Ch.) 74, 79. (2) W. N. (1902) 49.
(3) [1900] 1 Ch. 651.

and I should certainly follow it in case of need; but s. 77 (*a*) gives the Court a discretion, and the question which I have to consider is whether under the circumstances of this case I ought to exercise the discretion so as to mulct any one else, who attacks the plaintiff hereafter, in solicitor and client costs by reason of the certificate which I now give. In a sense, no doubt, the right to the exclusive use of the trade-mark has come into question. The motion was to rectify by striking out the mark on the ground that it had not been used for all the goods in the class under which it is registered. When the motion came to be opened, Mr. Upjohn, conceding that as regards some classes of the goods it had been so used, asked under the general words at the end of his notice of motion to attack the mark in respect of some only of the goods in that class. Mr. Jenkins took the objection that particulars had been given, that no such case was raised in the particulars, and said that he was not prepared to go into the question now. I accordingly ruled that Mr. Upjohn could not do it; and the result is that I have never tried that part of the motion at all, because it was abandoned, and rightly abandoned. I can say no more than this: it is plain that there is a question which may fairly be raised as regards the user by the plaintiff of the trade-mark in respect of some of the goods other than corsets. Ought I therefore, in the exercise of my discretion, to say that there has been such an adjudication here as would lead me to mulct a subsequent attacker of the trade-mark with solicitor and client costs? I think not, and consequently I refuse to give any certificate.

Solicitors for plaintiff: *Drake, Son & Parton.*
Solicitors for defendants: *Buxton Ashton & Co.*
Solicitor for comptroller: *Solicitor to the Board of Trade.*

H. L. F.

FARWELL J.
1902
Dec. 9.

In re MANN.
HARDY *v.* ATTORNEY-GENERAL.

[1902 M. 1845.]

Charity—Gift for Benefit of a named Institute—Institute erected for general Benefit of Inhabitants—Use for Purposes not strictly charitable—General Charitable Intention.

A testatrix gave 3000*l.* to trustees to be applied at their discretion for the benefit of the Mann Institute. The Mann Institute had been erected by the testatrix for the general benefit of the inhabitants of Moreton-in-Marsh. The building had never been conveyed to trustees, nor had any charitable trust thereof been created. It remained in the testatrix's own control, and had been used for purposes beneficial to the inhabitants:—

Held, that the bequest of 3000*l.* was a good charitable gift, and a scheme must be directed for its application.

Miss Edith Spicer Mann, the testatrix in this action, by her will, after appointing trustees and giving certain pecuniary legacies, proceeded: "I bequeath to my trustees the sum of 3000*l.*, to be applied by them in such manner as they shall consider most expedient for the benefit of the Mann Institute, Moreton-in-Marsh."

The testatrix died on May 30, 1902.

This summons was taken out by her executors for the determination of the question whether the bequest of 3000*l.* above stated took effect, and, if so, whether it constituted a good charitable bequest. The defendants were the Attorney-General and the residuary legatees.

The evidence shewed that the testatrix some years before her death was desirous of erecting some permanent memorial to her late father, who was born and had for many years resided in Moreton-in-Marsh, in the county of Gloucester. For this purpose she purchased a piece of freehold land, on which there were some old cottages, and had it conveyed to herself in her own name. She afterwards had the cottages pulled down, and at her own expense erected a building on the land, to which she gave the name of the Mann Institute, and which she intended to be used in various ways for the benefit of the

inhabitants of Moreton-in-Marsh, subject to her own control. She had informally nominated four persons to act as trustees or a committee of the Mann Institute, but had never conveyed the building to them, or made any rules for its management, or executed any declaration of trust. Two of the persons nominated as trustees died in the lifetime of the testatrix, but she had never appointed any one in their place. The sister of one of the deceased trustees had, after his death, at the request of the testatrix, acted as the representative of the committee in Moreton-in-Marsh.

The building had been formally opened at a public meeting, at which Miss Mann was present. A part of the building, consisting of a reading-room and billiard-room, was let to a working men's club at a nominal rent of 5*s*., the club agreeing to contribute to the salary of a caretaker and pay a proportion of the rates and charges for coal and lighting. The building also contained a hall, which was let at a fixed scale of charges for concerts, lectures, and religious and other meetings. There were also certain bedrooms in the building, which were reserved by the testatrix for the use of convalescents who were sent down by the Canning Town Women's Settlement, in which the testatrix was interested. During her life the testatrix had retained absolute control over the hall subject to the agreement with the working men's club.

J. L. Beattie, for the trustees.

R. J. Parker, for the Attorney-General. Whether the building called the Mann Institute is or is not subject to a charitable trust, there is a good gift of 3000*l*. for the purpose for which the testatrix had founded the Mann Institute. That purpose was the general benefit of the inhabitants of Moreton-in-Marsh, and it is a good charitable purpose.

Tyssen, for the testatrix's residuary legatees and devisees. The legacy is given for the benefit of the Mann Institute, i.e., for the benefit of the building, which now belongs to my clients. No charitable purpose can be inferred from the way in which the building was used, for it was not used for any charitable purpose. A working men's club is not a charity.

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It is a mere social club, not intended specially for the benefit of its poorer members, and therefore not a charity: *Cunnack* v. *Edwards* (1); *In re Clark's Trust.* (2) Still less is the letting of the hall for concerts, &c., a charity. A charge was always made. Whatever public benefit there was could be claimed by the wealthy and well-to-do as well as those in need, and therefore there was no charity.

R. J. Parker, in reply. The testatrix founded an institute for the general benefit of the village of Moreton-in-Marsh. That is a good charity, just as a gift to build a town hall is. A friendly society or a working men's club may or may not be a charity. The test is not whether any rich person may use the institution, but whether it is merely an association for the benefit of all its members, as in the cases of which *In re Dutton* (3) is an instance, or an institution for the benefit of the public. If once a public purpose can be shewn, it is charitable. It does not matter how the building has been used; the 3000*l.* is given to the purposes for which the testatrix thought she had founded an institute. They are charitable purposes; and if the testatrix has made a mistake, and the institute was not founded, the gift is not therefore a bad charitable gift. In *In re Davis* (4) a gift to the "Home for the Homeless" was held a good charitable gift, though no institution of that name had ever existed.

FARWELL J. In this case I think Mr. Tyssen's ingenious argument has been dispelled by Mr. Parker's reply. I think Mr. Parker is well founded in saying on the evidence that the testatrix intended to found an institute to be used in various ways for the benefit of the inhabitants of Moreton-in-Marsh. Then the evidence goes on to specify the various modes in which it was attempted to attain that benefit. Now I have to decide this question on the assumption that the testatrix did not convey the land on which the institute stood in a mode sufficient to satisfy the Statute of Frauds or the Mortmain Acts, for that question is not raised on the summons. Assuming,

(1) [1896] 2 Ch. 679.
(2) (1875) 1 Ch. D. 497.
(3) (1878) 4 Ex. D. 54.
(4) [1902] 1 Ch. 876.

therefore, that this institute used, as stated in the affidavits, during the testatrix's life, could no longer be so used against the will of her residuary legatees after her death, I find that she has by her will given 3000*l.* to trustees to be applied by them in such manner as they may consider most expedient for the benefit of the Mann Institute in Moreton-in-Marsh. Mr. Tyssen argued that that was for the building only, but I cannot adopt that construction. That is too narrow a view. I think it is for the purposes for which the Mann Institute was founded—that is to say, for the benefit of the inhabitants. Now that is a charitable purpose; and the two particular modes in which the building was used during the testatrix's lifetime, namely, for a working men's club, and for a hall and gallery for concerts, lectures, and other meetings, were both public purposes for the benefit of the inhabitants, not inconsistent with the general charitable intention which I have already inferred. Therefore I answer the question by saying that the bequest of 3000*l.* to be applied as in the will mentioned takes effect, and is a good charitable bequest. There must be a scheme for its application.

[After some discussion the costs were ordered to be paid out of the residue of the testatrix's estate.]

Solicitor for Attorney-General: *The Solicitor to the Treasury.*
Solicitors for all other parties: *Leslie & Hardy.*

J. R. B.

BUCKLEY J.

1902

Dec. 10.

In re GARWOOD'S TRUSTS. GARWOOD *v.* PAYNTER.

[1901 G. 1796.]

Partnership—Assignment of Share—Payment of Salaries to Partners—Right of Assignee to interfere—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *ss.* 24, 31.

Three partners were carrying on business under the terms of a deed which provided that they should be entitled to the profits in equal shares, but contained no affirmative clause defining the duties of the partners, nor any provision for the payment of a salary to any partner. By a settlement made in 1889 one of the partners charged his share in the undertaking with payment to trustees of 10,000*l.* and interest, and also covenanted to pay to them all the rest of his share of the profits after making certain payments. Subsequently to the date of this settlement the partners came to an agreement under which, in consideration of their doing more work for the business, they received salaries. It was proved that this was done bonâ fide, and that the partners did work for their salaries :—

Held, that payment of the salaries was part of the "management or administration" of the business within s. 31 of the Partnership Act, 1890, and was binding on the assignees under the settlement.

By a deed of November 21, 1870, J. T. Garwood and two other persons entered into partnership as colliery proprietors for a term of thirty-one years. The deed contained no affirmative clause defining the duties of the partners, nor any provision for the payment of a salary to any partner. In 1874 the defendant H. A. Paynter bought a one-third share, and in 1877 a Mr. Nathaniel Dunn bought another one-third share of the partnership undertaking, and after that date the firm consisted of Messrs. J. T. Garwood, Paynter & Dunn, and they carried on business under the terms of the deed, and were entitled to the profits in equal shares.

By a settlement dated February 21, 1889, Garwood, in consideration of covenants by his wife contained in a separation deed of even date therewith, charged his share in the partnership business and assets (subject to certain mortgages) with payment to two trustees, of whom Paynter was one, of 10,000*l.* with interest at 6 per cent.; and it was agreed that the

trustees should make certain payments, and subject thereto should pay one-third of the income to Garwood, and the remainder to his wife. Garwood also covenanted during the partnership to pay to the trustees all the rest of his share of the profits of the business, subject to some specified deductions, to be applied by them in the same way as the income of the 10,000*l.* The business did not at first engage the active attention of the partners, but in 1893 and 1894 arrangements were made by the partners under which Garwood acted as manager of the London branch of the business for about two years at a salary of 150*l.* a year. Since that time he had received nothing by way of salary. Under the same arrangement Paynter, who was a practising solicitor, gave up one day a week to the business, and acted as manager at a salary of 150*l.*; and Dunn went regularly to the colliery, and looked after the stores and books and checked the sales of coal at the pit's mouth at a salary at first of 100*l.* and afterwards 150*l.* a year. These arrangements were made by agreement between the partners, and it was proved that they were made bonâ fide, and that the partners did work for their salaries. Mrs. Garwood on several occasions objected to the payment of the salaries; but in 1897 an account was settled between her and the trustees with full knowledge by her and on the footing that these salaries were being paid.

Many questions arose between Mrs. Garwood and her trustees, but the only one which calls for a report was whether, as against the assignees of Garwood's share in the partnership assets, the payment of the salaries could be supported.

Buckmaster, K.C., and *Clauson*, for Mrs. J. T. Garwood. The partners might have appointed some other person to do the work at a salary, but, as against the assignees of a partner, they could not agree to pay anything to one of themselves. Except by agreement a partner is not entitled to remuneration for acting in the partnership business: s. 24, sub-s. 6, of the Partnership Act, 1890. Here no consent could be given by Paynter, who was one of the partners, because he was a trustee of the deed of 1889, nor by Garwood, because to do so would

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be to derogate from his grant. Neither of them could, as against us, increase the share which he was to take out of the profits. All payments to a partner are profits to which the assignee is entitled unless he has taken the assignment with notice of the salary.

Astbury, K.C., and *Borthwick*, for Paynter. Assuming that this point can be decided in the absence of the third partner, Dunn, we submit that Mrs. Garwood cannot interfere with these salaries. They were paid bonâ fide for extra work done, and are protected by s. 31. Under that section an assignee has now no right to interfere with the partners on questions of management of this sort. The only requisite is that the partners should be acting bonâ fide, and that they should all agree: Lindley on Partnership, 6th ed. pp. 367, 575. The assignee must accept the account of profits agreed to by the partners: *Watts* v. *Driscoll*. (1) Mrs. Garwood knew about these salaries before she settled the accounts in 1897.

H. Terrell, K.C., and *Sheldon*, for Garwood.

Buckmaster, K.C., in reply. Sect. 31 only says that the assignee shall not interfere with the partners in carrying out the terms of the partnership deed. These salaries were not agreed to in good faith. The partners were already bound to give the whole of their time to the business, and they did not displace anybody and undertake his work.

Mrs. Garwood has frequently objected to the payment of these salaries, and she has never waived her claim to impeach them.

BUCKLEY J. stated the facts, and continued:—The question I have to determine is whether, as against the assignees of Captain Garwood's share, the two 150*l.* salaries can be charged. Sect. 24, sub-s. 6, of the Partnership Act provides that no partner shall be entitled to remuneration for acting in the partnership business. So I start with this—that the two partners, Mr. Paynter and Mr. Dunn, were primâ facie not entitled to anything because they acted in the partnership business. But under s. 31 of the Act an assignment by a partner

(1) [1901] 1 Ch. 294, 307.

of his share does not give the assignee during the continuance of the partnership any right to interfere in the management or administration of the partnership business, and the assignee must accept the account of profits agreed to by the partners. He is entitled only to receive the share of profits to which the assigning partner would otherwise be entitled. The question is whether an arrangement such as this (which it is conceded was bonâ fide made in the sense that it was not intended to defeat the rights of Mrs. Garwood in any way, and was not improper or fraudulent) does not bind the assignee as being something done in the management or administration of the partnership business of which he cannot complain. It seems to me that the conclusion that an assignment prevented partners from arriving bonâ fide at such an arrangement as this would be a disastrous one. Mark what it means. A., B., and C. are partners; A. assigns; B. and C. cannot say that that is a dissolution. The contention involves this—that B. and C. continue bound towards a partner who by the assignment is rendered incapable of bonâ fide agreeing with them in such a matter of management or administration as this which otherwise he could have agreed to. That would be a very serious result. The intention of the Act was to substitute the assignee for the assignor as the person entitled to such profits as the assignor would have received if there had not been an assignment, but to give the assignee no right to interfere at all with anything bonâ fide done in management or administration. Suppose this case as an illustration: A house belonging to the partnership is let at a rental, but the partners think it desirable that one of the partners should live there because it is adjacent to the partnership premises, or because for some other reason it would be advantageous to the partnership; and so, on the determination of the lease or by an arrangement that the tenant shall quit, the tenant goes and the partner enters and lives there paying no rent. Could an assignee complain of that? I should say not. In the beneficial management or administration of the partnership the partners agree amongst themselves to something, which I agree will diminish the profits of the partnership by the amount

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of the rent, but it is something bonâ fide done for management or administration.

Here, as a matter of fact, what took place was this. The three partners—Garwood, the assignor, no doubt was one—bonâ fide considered that it was beneficial for the partnership that the sales at the pit's mouth should be checked so as to stop robbery, and that one partner should go and superintend that work and see that those moneys were properly received, and that he should be paid for his work. I think that is something bonâ fide done in the management and administration of the partnership business. Mrs. Garwood cannot say she has lost the 150*l.* and at the same time take the benefit of the saving which has perhaps been effected by stopping the robbery in the sales thus made.

Further, this has to be borne in mind—that in 1897 there was a settlement of accounts upon the footing that these salaries had been paid, and that all things had been done perfectly honestly and above board, and that the partnership business might have suffered if the additional work these two persons themselves performed had not been done. In 1894 Garwood's office and salary ceased, and, therefore, the real effect was that Paynter and Dunn gave their time (Garwood not giving a similar amount of time), and in the result produced profits for the partnership, and for that they received certain salaries. I think that was an act in the management or administration of the partnership which under the 31st section of the Act of Parliament is binding upon the assignee.

I may say that I feel no difficulty in deciding this in the absence of Dunn, inasmuch as I am deciding the point in his favour. He was a partner who was party to arranging these salaries, and I can in his absence decide something which is not against him.

I therefore hold that the salaries ought to be allowed.

Solicitors: *Collyer-Bristow, Hill, Curtis & Dods, for Ralph Sheriton Holmes, Newcastle-upon-Tyne; King, Wigg & Co., for Clayton & Gibson, Newcastle-upon-Tyne; Withers, Pollock & Crow.*

H. C. R.

In re INMAN.
INMAN *v.* INMAN.

[1902 I. 1854.]

SWINFEN EADY J.

1902

Nov. 21, 25.

Estate pur autre vie—Devise of Entirety—No Words of Limitation—Intestacy of Devisee—Devolution—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 6.

A testator devised an equitable estate pur autre vie, limited to himself, "his heirs and assigns," to certain trustees, "their heirs and assigns," for the use of his grandson, describing the property as freehold hereditaments. The grandson died intestate:—

Held, that, though the entire estate had passed to the grandson, there was nothing on the face of the will to entitle his heir to claim as special occupant, and the estate therefore passed to his administrator under the Wills Act, 1837, s. 6.

Doe v. *Lewis*, (1842) 9 M. & W. 662, followed.

Philpotts v. *James*, (1784) 3 Doug. 425, distinguished.

Wall v. *Byrne*, (1845) 2 J. & Lat. 118, and *In re King*, [1898] 1 I. R. 91; [1899] 1 I. R. 30, not followed.

Held, also, that as the estate was equitable, there was no general occupancy, pending the administrator's appointment, but that when appointed he would take the entirety.

ORIGINATING SUMMONS.

By a post-nuptial settlement dated January 25, 1836, and made between the husband of the first part, trustees of the second part, and the wife of the third part, certain hereditaments at Portchester, in the county of Southampton, were conveyed unto and to the use of the trustees, their heirs and assigns, to the use of the husband for life with remainder to the use of the wife for life, and after her decease to such uses as she should by deed or will appoint. And in default of appointment to the use of the trustees, their heirs and assigns, upon trust to receive the rents and profits, and pay and divide the same equally between James White Morey and six other persons and their respective assigns as tenants in common for their respective lives, with divers remainders over.

The wife died on September 23, 1836, without exercising her power of appointment, and the husband died on September 29, 1836.

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By an indenture dated November 29, 1848, and made between James White Morey of the one part and the Rev. James Inman of the other part, James White Morey conveyed his seventh part or share during his life in the said hereditaments unto James Inman, his heirs and assigns.

By his will dated November 15, 1852, the Rev. James Inman devised and bequeathed all his freehold, copyhold, and leasehold hereditaments to his wife Mary Inman for life, and after her decease he devised (inter alia) "all that my part or share" in the freehold hereditaments at Portchester, in the county of Southampton, and in the rents thereof purchased of James White Morey and conveyed to the testator by an indenture dated November 29, 1848, "with all my estate and interest therein," unto certain trustees, their heirs and assigns, upon trust that they should receive "my part or share of and in such rents and profits," and pay and apply the same in manner thereinafter directed, and upon further trust, if they should think it desirable, to sell the said share, and to invest the proceeds upon Government or real securities, and to pay and apply the interest or the share of the rents and profits until sale "for the use of my grandson Matthew Inman" in such manner as they should think proper for promoting his education and advancement in life. "And upon further trust to pay and transfer my share in the said rents and profits or the stocks, funds, and securities in or upon which the produce thereof shall have been invested, in case the same has been previously sold, unto my said grandson Matthew Inman as and when he shall attain the age of 25 years, or if my said trustees shall deem it desirable and conducive to his interest so to do to assign and transfer the same to him at such earlier period as they may decide on."

The testator died on February 7, 1859.

The testator's wife Mary Inman died on December 27, 1870.

Matthew Inman, the grandson, died on May 9, 1886, a bachelor and intestate.

James White Morey, the cestui que vie, died on August 3, 1901.

The trustees of the settlement, who had accumulated the

income of the share from the death of the grandson to the death of the cestui que vie, had acknowledged the right of the trustees of the will to a transfer of the accumulated fund.

This summons was issued to determine whether the grandson's estate pur autre vie had passed on his death to his heir-at-law or how otherwise.

No letters of administration to the grandson's estate had at present been granted.

R. J. Parker, for the trustees of the will.

Theobald, *K.C.*, and *Paice*, for a person representing the heir-at-law. An estate pur autre vie, though a freehold, was not originally devisable, and unless there were words of limitation to the heirs in the original grant, or in a subsequent conveyance, making it a descendible freehold—Burton's Compendium, 8th ed. p. 240; *Holden* v. *Smallbrooke* (1)—it became subject to general occupancy on the death of the tenant: Co. Litt. 41 b; *In re Michell.* (2)

General occupancy was to a large extent abolished by the Statute of Frauds (29 Car. 2, c. 3, s. 12), which made the estate devisable, and provided that if not devised, it should be chargeable in the hands of the heir, if it should come to him by reason of a special occupancy as assets by descent, as in case of lands in fee simple; and in case there were no special occupant, it should go to the executors or administrators of the party that had the estate by virtue of the grant, and be assets in their hands. The framers of the section evidently thought the special occupant took by descent.

The 14 Geo. 2, c. 20, s. 9, provided that where there was no special occupant and no devise the estate should be distributed as personal estate. These sections are repealed and re-enacted by the Wills Act, 1837 (1 Vict. c. 26), ss. 3, 6. Now the testator in this case clearly intended to pass his entire interest in his so-called freehold hereditaments, and that interest passed without words of limitation under s. 28 of the Wills Act. The devisee, therefore, took an estate of the same quantity and

(1) (1668) Vaugh. 187, 201. (2) [1892] 2 Ch. 87, 96.

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quality as his devisor, i.e., a freehold descendible to his heir as special occupant: *Philpotts* v. *James* (1); *Blake* v. *Jones* (2); *Wall* v. *Byrne* (3); *In re King*. (4)

Assuming, however, that the estate would have gone to the administrator if appointed, it did not do so in this case, as the estate is at an end, and no administrator is yet appointed.

On the intestacy of a legal tenant pur autre vie of an entire estate there is a general occupancy until an administrator is appointed, as otherwise the freehold would be in abeyance: 1 Preston Conv. 44. But there cannot be general occupancy of an undivided share, as there can be no entry on that share. The share must, therefore, descend to the heir until an administrator is appointed.

Now the same rule of descent must apply to equitable estates, although the reason for that rule is inapplicable.

The equitable share therefore descended on the heir, pending the appointment of an administrator, and under the circumstances he became entitled to the whole of the accumulations.

Sheldon, for the next of kin. The Irish decisions in *Wall* v. *Byrne* (3) and *In re King* (4) are inconsistent with the English decisions in *Doe* v. *Robinson* (5), *Doe* v. *Lewis* (6), and *In re Sheppard* (7), and with the decision of the House of Lords in the Irish case of *Earl of Mountcashell* v. *More-Smyth*. (8) The latter cases shew that the special occupant (if any) must be appointed in the last document passing the estate. The estate is not a descendible freehold, as the heir could formerly plead riens per descent to an action on his ancestor's bond: *Doe* v. *Luxton*. (9) Even in the case of equitable estates an heir cannot take as special occupant without words of limitation: *Reynolds* v. *Wright* (10); *Earl of Mountcashell* v. *More-Smyth*. (8)

The reasons given for the judgments in *Philpotts* v. *James* (1) are inconsistent and unsatisfactory. The Statute of Frauds

(1) 3 Doug. 425.
(2) (1813) 1 Hud. & B. 227, n.
(3) 2 J. & Lat. 118.
(4) [1898] 1 I. R. 91; [1899] 1 I. R. 30.
(5) (1828) 8 B. & C. 296.
(6) 9 M. & W. 662.
(7) [1897] 2 Ch. 67.
(8) [1896] A. C. 158, 165.
(9) (1795) 6 T. R. 289, 291.
(10) (1860) 2 D. F. & J. 590.

does not prefer the heir, as any one can be named as special occupant.

The decision of Sugden L.C. in *Wall* v. *Byrne* (1) was new even in Ireland. The decisions in *Doe* v. *Cassidy* (2) and *Jack* v. *Jamieson* (3) were the other way. No reason is given for the judgment in *Blake* v. *Jones*. (4)

As to the second point, the estate was in the trustees of the settlement, and they hold the proceeds for the administrator when appointed.

Theobald, K.C., in reply. In *Doe* v. *Lewis* (5) the descent was held to be broken by a devise to the devisee and his assigns.

In re Sheppard (6) is not in point, as the estate was created without words of limitation; but Romer J. cites *Philpotts* v. *James* (7) without disapproval, and distinguishes it on the ground that the gift of the "freehold lease" was equivalent to mentioning the heirs.

In *Earl of Mountcashell* v. *More-Smyth* (8) the estate was created by deed, and the trustees of the legal estate had no power to alter the estate of the infant beneficiary, who obviously took only a life interest.

The dictum of Lord Davey, that "you look to the terms of the last conveyance," does not apply to a will.

SWINFEN EADY J. (after stating the facts). It being agreed on both sides that the whole of the testator's interest passed to his grandson, it is contended on the one hand that by reason of the description in the will it passed to him as freehold, and in the same manner and with the same legal effect as if it had been devised to him and his heirs; so that on his death, intestate, his heir-at-law was entitled to enter as special occupant. It is contended on the other hand that, although the whole interest passed to the grandson, there is nothing on the face of the will to indicate that his heir was to take as special occupant, and therefore the interest passed to his

(1) 2 J. & Lat. 118.
(2) (1807) 1 Hud. & B. 222, n.
(3) (1811) 1 Hud. & B. 225, n.
(4) 1 Hud. & B. 227, n.
(5) 9 M. & W. 662.
(6) [1897] 2 Ch. 67.
(7) 3 Doug. 425.
(8) [1896] A. C. 158, 165.

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executor or administrator under the provisions of s. 6 of the Wills Act.

Before the Statute of Frauds an estate pur autre vie was not devisable. If a grant was made to a man and his heirs, the heir was entitled to enter as special occupant on the death of the grantee, and if there was no special occupant, i.e., if a grant was made of an estate pur autre vie to a man without mentioning his heirs, there was a case of general occupancy; but the estate of a tenant pur autre vie was not devisable. Then the Statute of Frauds, for the first time, made such an interest devisable, but both before and after the statute the heir could only take as special occupant and not by descent. That clearly appears from a passage in Lord Kenyon's judgment in *Doe* v. *Luxton* (1), where he says: "These questions on estates pur autre vie do not frequently arise. Such estates certainly are not estates of inheritance: they have been sometimes called, though improperly, descendible freeholds; strictly speaking they are not descendible freeholds, because the heir-at-law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor, he might have pleaded riens per descent, for these estates were not liable to the debts of the ancestor before the Statute of Frauds." So that if an heir entered as special occupant he was not liable for the debts of his ancestor, i.e., for such of the debts of his ancestor as he would have been liable for according to the then state of the law in case he took assets by descent, i.e., debts secured by bond or covenant.

Then s. 12 of the Statute of Frauds enacted that any estate pur autre vie should be devisable by will in writing attested by three witnesses: "And if no such devise thereof be made the same shall be chargeable in the hands of the heir if it shall come to him by reason of a special occupancy as assets by descent as in case of land in fee simple."

I read that as meaning, not that before the statute the heir took the estate as assets by descent and not as a special occupant, but that after the passing of the Act he was to be liable as if it had been assets by descent in the same manner as

(1) 6 T. R. 289, 291.

in the case of lands in fee simple. Then the statute goes on to say: "In case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof, by virtue of the grant, and shall be assets in their hands." Then subsequent question arose as to whether, after the payment of the debts of the intestate, the executors took beneficially, and that matter was dealt with by the statute of George II., under which they took, after paying the debts, for the benefit of the next of kin.

Those provisions are substantially re-enacted by the Wills Act, so that it is not sufficient in the present case to shew that the grandson took the whole estate pur autre vie. It may be that in a certain sense he took a descendible estate; but his heir, if mentioned, would not have taken it by descent, but as a special occupant; and if he is not sufficiently indicated in the will as a special occupant, it goes to the executor or administrator.

It has been contended, mostly on the footing of certain cases decided in Ireland, that where the whole estate pur autre vie is vested by the terms of the grant or devise in an intestate, his heir is entitled, at all events if the instrument vesting the estate indicates an intention that it is to go as a freehold, or that the intestate is to take an estate of the same quantity and quality as his grantor or testator. *Wall* v. *Byrne* (1) and *In re King* (2) certainly go that length. *Wall* v. *Byrne* (1) was decided some time before the recent decision of the House of Lords in *Earl of Mountcashell* v. *More-Smyth*. (3) *In re King* (2) was decided after that case. As decisions of the Court in Ireland, they are not binding on me; and if they conflict with decisions in England, or if they are not consistent with my view of the English law, I should decline to follow them; and, therefore, I proceed to consider the English cases.

The first is *Philpotts* v. *James*. (4) The judgments are not very fully reported; but the case for the plaintiff, who claimed a moiety of the estate from the legal personal representative of the devisee, was made in two ways. First, it was said that by

(1) 2 J. & Lat. 118.
(2) [1898] 1 I. R. 91; [1899] 1 I. R. 30.
(3) [1896] A. C. 158, 165.
(4) 3 Doug. 425, 427, 428.

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the effect of the will of Thomas James, whereby he gave all his freehold lease to his nephew Meredith, it was the same as if the word "heirs" had been mentioned, and that the plaintiff, as one of the heirs of Meredith, was entitled to a moiety as a special occupant. But then, it was argued, supposing that view was not correct, and supposing Thomas James had not made any change in the original special occupancy by his will, still the plaintiff was entitled to a moiety as one of the heirs of the original grantee, and I gather that Buller J. preferred that view. It is quite clear that the case was put on behalf of the plaintiff on that ground as an alternative ground; in other words, that there being an original grant to Thomas James and his heirs, and Thomas James having given the estate to Meredith only, without mentioning heirs, it might well be that Meredith only took an estate for life, and that on his death the co-heirs of Thomas James would then take according to the terms of the original gift. In arguing the case for the plaintiff it was contended: "By that will the estate is devised to Meredith James, without mention of his heirs; but as the original grant was to Thomas James and his heirs, that circumstance is immaterial, since the plaintiff is one of the heirs-at-law of Thomas James, the original grantee, and as such within the grant." And Buller J.'s view was that the plaintiff took as heir of a descendible freehold. He adds: "If it were necessary to go farther, I agree with the rest of the Court that the estate is sufficiently given by the will." But it seems to me the actual decision may be supported on the ground that the only interest granted by Thomas James being to Meredith without mention of his heirs, and the original grant being to Thomas James and his heirs, the heirs of Thomas James were entitled to enter as special occupants on the death of Meredith.

The next case, *Doe* v. *Lewis* (1), is clearly against the heir's title. In that case there was a lease to William Lewis, his heirs and assigns, for the lives of three persons, one of whom was still living. William Lewis devised the premises to his son, W. J. Lewis, and his assigns during the residue of the lease. That devise clearly passed the whole term, and not merely a

(1) 9 M. & W. 662.

life estate, to the devisee. The devisee having died intestate, the defendant took possession as his heir-at-law, and ejectment was brought by the legal personal representative.

If the mere fact that the whole lease is devised entitles the devisee's heir to take on his intestacy, the heir should have taken in *Doe* v. *Lewis*. (1) But Parke B. said: "Now here there is no special occupant, the title of the first lessee having been put an end to by the will; the land has been held under a tenancy pur autre vie to W. J. Lewis the son, and his assigns; and as he died without creating any assigns, the property goes to his personal representative. It is said, however, that although there was here no express assignment by W. J. Lewis the son, the property may go to his heir, as being the assign in law; but it must be remembered that this is a devise under the stat. 29 Car. 2, c. 3, not under the Statute of Wills, relating to an estate in fee simple; and I do not think that 'assigns' can be considered as comprised under the words 'heirs, executors, or administrators,' used in that statute. The word 'assign' does not mean 'heir'; it means a person substituted for another by an act of some kind or other; and as the devisee has not done any act to appoint any assign, the property must go to his administratrix."

Counsel for the heir attempted to distinguish that case on the ground that the original limitations were broken by the use of the word "assigns"; but in my opinion the result would have been the same if the word "assigns" had never been mentioned at all. True, there was a devise to W. J. Lewis and his assigns, but he had not appointed any assign, and consequently, there being no special occupant, the whole went to the executor.

Therefore, as it appears to me, I have to choose between the Irish and English cases, because certainly the recent decision of the House of Lords in *Earl of Mountcashell* v. *More-Smyth* (2) does not throw any doubt upon the English decisions.

In my opinion there is nothing whatever on the face of this will to entitle the heir to claim as special occupant. The

(1) 9 M. & W. 662, 664.

(2) [1896] A. C. 158.

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whole of the interest is given to the grandson, and there the matter is left at large, and, as there is no special occupant, the property goes to the administrator under the provisions of the Wills Act. If that were all, I am of opinion that the administrator would be entitled to take.

But it was further contended on behalf of the heir that the administrator could only take from the date of the grant of letters of administration, and that until that time the heir was entitled. But no case of general occupancy can have arisen in this case. The trustees of the original settlement were entitled to hold and enjoy the property, receive the rents, and to hold them in trust for the persons beneficially entitled; and in my opinion one-seventh of the rents that accrued between the death of the grandson and the death of the cestui que vie was received, and is still held by them in trust, for the grandson's legal personal representative, when constituted, as part of his personal estate.

Solicitors: *Paice & Cross.*

G. R. A.

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In re FEARNSIDES. BAINES *v.* CHADWICK.

[1899 F. 304.]

Will—Estate Duty—Incidence—General Power—Appointed Fund—Residue—Direction to pay Testamentary Expenses—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

A testatrix, having directed the executors and trustees of her will to pay her testamentary expenses, bequeathed (inter alia) certain specific personalty, over which she had a general power of appointment, to her trustees upon trust for certain specific legatees.

She devised and bequeathed her residuary real and personal estate to her trustees upon trust for sale and conversion, the net proceeds to be paid to certain residuary legatees. The testatrix died on June 20, 1898:—

Held, that the appointed fund had passed to the executors "as such" within the meaning of the Finance Act, 1894, s. 9, sub-s. 1, so that the estate duty was payable out of residue:

Held, also, that the will itself imposed this duty on the residue, the

residuary estate being what remained after satisfying the previous dispositions of the will, including the direction to pay testamentary expenses, which covered estate duty: *In re Clemow*, [1900] 2 Ch. 182.

ORIGINATING SUMMONS.

By her will dated April 21, 1897, Susannah Fearnsides, widow, after appointing the plaintiffs and another person, who predeceased her, to be executors and trustees of her will, and directing them to pay her funeral and testamentary expenses and debts, demised and bequeathed unto her trustees—first, a leasehold colliery called the Howley Park Colliery and the plant thereto belonging and the benefit of all contracts subsisting in respect thereof, and all office fixtures, account books, book debts, and other the appurtenances of the colliery business, including all property in the colliery and connected therewith of which she had power to dispose; and, secondly, her lands and hereditaments (including lands and hereditaments of which she had power to dispose) situate in the township of Morley and coloured red on the plan thereto annexed, upon trust to carry on and receive the profits of the colliery for such period as the leases in connection therewith or any new leases continued, and to let such of the lands coloured red as were not required for the working thereof, and to hold the net profits and rents during the continuance of the working, and the colliery and lands after the discontinuance of the working, upon trust for the benefit of certain specific legatees.

And the testatrix devised and bequeathed her residuary real and personal estate whatsoever and wheresoever, including any estate or property of which she had power to dispose, to her trustees upon trust to sell and convert the same into money, and after payment of the costs and expenses of such sale and conversion to pay the net proceeds to the Royal Agricultural Benevolent Institution, to be applied for the relief and benefit of necessitous and deserving farmers and their families residing within the county of York.

The testatrix died on June 20, 1898.

The testatrix was entitled to the said lands and to one moiety of the leasehold colliery absolutely. The other moiety was held by the trustees of her late husband's will on trust for sale,

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with a power to postpone the sale and carry on the colliery, the proceeds of sale and the profits until sale being held on trust for the testatrix for life, and after her death for her testamentary appointees, and in default of appointment for her statutory next of kin.

This was a summons for the administration of the trusts of the testatrix's will. On taking certain accounts in chambers the question arose whether the estate duty on the appointed fund was to be borne by that fund or the residue. The trustees having paid the duty and charged it to residue, the residuary legatees carried in objections which were referred to the Court.

Micklem, K.C., and *Kenyon Parker*, for the residuary legatees. The appointed moiety, not being legal assets, which the executors would have been entitled to receive virtute officii on the mere production of the probate, did not pass to them "as such" within the meaning of the Finance Act, 1894, s. 9, sub-s. 1. (1) The duty is therefore a charge on the fund, and

(1) The Finance Act, 1894, provides as follows:—

"*Grant of Estate Duty.*"

Sect. 1: "In the case of every person dying after the commencement of this Part of this Act, there shall .... be levied and paid, upon .... all property .... which passes on the death of such person a duty, called 'Estate duty' ...."

Sect. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

"(*a*) Property of which the deceased was at the time of his death competent to dispose."

"*Collection and recovery of Duty and value of Property.*"

Sect. 6, sub-s. 1: "Estate duty shall be a stamp duty, collected and recovered as hereinafter mentioned."

Sub-s. 2: "The executor of the deceased shall pay the Estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the Estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment."

Sect. 8, sub-s. 3: "The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which Estate duty is payable upon the death of the deceased, and shall be accountable for the Estate duty in respect of all personal property wheresoever situate of which

must be repaid under sub-s. 4: *In re Treasure* (1); *In re Maddock* (2); *In re Power.* (3) Before the Probate Duty Act, 1860 (23 & 24 Vict. c. 15), s. 4, probate duty would not have been payable on this moiety, the executors, quâ executors, having no title: *Platt* v. *Routh.* (4)

If the power is exercised, executors take as appointees for the purpose of paying debts and subject thereto for the beneficiaries: *In re Treasure* (1); but the mere appointment of executors does not execute the power and gives them no title at all: *In re Davies' Trusts* (5); *In re Thurston.* (6)

Sect. 6, under which the duty has been paid by the executors, is mere machinery for collection, and throws no light on

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the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received."

Sub-s. 4: "Where property passes on the death of the deceased, and his executor is not accountable for the Estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the Estate duty on the property, and shall, within the time required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property."

Sect. 9, sub-s. 1: "A rateable part of the Estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a bonâ fide purchaser thereof for valuable consideration without notice."

Sub-s. 4: "If the rateable part of the Estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments and with the same interest as are in this Act mentioned."

(1) [1900] 2 Ch. 648, 652.

(2) [1901] 2 Ch. 372.

(3) [1901] 2 Ch. 659.

(4) (1840) 6 M. & W. 756, 791; 55 R. R. 777.

(5) (1871) L. R. 13 Eq. 163, 166.

(6) (1886) 32 Ch. D. 508.

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the incidence of the duty: *In re Maryon-Wilson.* (1) That is provided for by s. 9.

Hon. E. C. Macnaghten, K.C., and *Christopher James*, for the trustees and executors. The appointed moiety passed to the executors as such within the meaning of s. 9, sub-s. 1: *In re Moore* (2); *In re Dixon.* (3) Executors do not take an appointed fund under but against the appointment, stopping it in transitu for the benefit of creditors: *Lord Townshend* v. *Windham.* (4) Of course, if there is no appointment, there is no fund for them to stop; but if there is, they take it as executors.

It is on this principle that an administrator cum testamento annexo, though not named in the will, can give a receipt for an appointed fund—*In re Peacock's Settlement* (5)—in the same way as an executor: *In re Hoskin's Trusts* (6); *Hayes* v. *Oatley.* (7)

Sect. 9 refers to the recoupment of voluntary payments under the second part of s. 6, sub-s. 2, and not to compulsory payments under the first part of the sub-section.

Eve, K.C., and *Pattullo*, for the specific legatees. The trustees are expressly directed to pay funeral and testamentary expenses and debts. Primâ facie, therefore, these must be paid out of the same fund, i.e., residue. Estate duty, therefore, being a testamentary expense—*In re Clemow* (8)—must be paid out of residue.

Micklem, K.C., in reply.

Cur. adv. vult.

Dec. 2. SWINFEN EADY J. The question remaining to be disposed of upon the present summons is whether the rateable part of the estate duty payable upon and in respect of one moiety of the Howley Park Colliery, over which the testatrix had a general power of appointment, and which she specifically appointed and bequeathed by her will, is to be borne by this moiety, or is payable out of the residue of the estate, which

(1) [1900] 1 Ch. 565, 570.
(2) [1901] 1 Ch. 691.
(3) [1902] 1 Ch. 248, 251, 257.
(4) (1750) 2 Ves. Sen. 1, 11.
(5) [1902] 1 Ch. 552.
(6) (1877) 6 Ch. D. 281, 283.
(7) (1872) L. R. 14 Eq. 1.
(8) [1900] 2 Ch. 182.

the testatrix bequeathed to the Royal Agricultural Benevolent Institution.

If this appointed moiety passed to the executors of the testatrix "as such" within the meaning of the Finance Act, 1894, then the duty was properly payable out of residue, and the residuary legatees are not entitled to have the amount so paid recouped out of the specific property. If, however, the appointed moiety did not pass to the executors "as such" within the meaning of s. 9, sub-s. 1, of the Finance Act, then (unless the will contains a direction to the contrary) the duty will be a first charge on the appointed moiety, and must be recouped under sub-s. 4 of the same section.

It is clear that the moiety of the colliery in question was "Property of which the deceased was at the time of her death competent to dispose," within s. 2, sub-s. 1, and that estate duty was payable in respect of it.

By s. 6, sub-s. 2, the executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at her death. The executors were, therefore, in my opinion bound to pay the estate duty on this moiety of the colliery.

By the same sub-section they are empowered (but not required) to pay the estate duty in respect of any other property (that is, other than personal property of which the deceased was competent to dispose at her death) which by virtue of any testamentary disposition of the deceased is under the control of the executor, or in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment. A subsequent part of the statute emphasizes this distinction; the executor is made accountable for duty which he is required to pay: he is not made accountable for duty which he is only empowered to pay.

By s. 8, sub-s. 3, the executor is (to the best of his knowledge and belief) to specify in appropriate accounts all the property in respect of which estate duty is payable upon the death of the deceased (that is, all property whether real or personal, and whether the executor is under any obligation to

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pay the estate duty or not); the sub-section then provides that the executor shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at her death; this language is identical with that in s. 6, sub-s. 2, and undoubtedly extends to and includes all personal property over which the deceased had a general power of appointment; sub-s. 3 of s. 8 then further provides that the executor shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received. Having regard to the context in which these words are found, following upon an enactment making the executor accountable for estate duty in respect of appointed personal estate, I am of opinion that he is protected from liability, not in respect of all appointed funds (upon the ground that he does not receive them "as executor"), but only in respect of personal estate, whether the testatrix's own property or subject to her general power of appointment, in excess of the amount received or which but for wilful default he might have received. In other words, that the expression "the assets which he has received as executor or might . . . . have received" includes appointed personalty as well as the testatrix's own personalty.

In *In re Hoskin's Trusts* (1) it was treated by the Court of Appeal as established beyond all question that where a feme covert, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor when he has proved the will is entitled to receive the appointed fund.

Nor is it now open to dispute that the executor is bound to apply the fund as assets—equitable assets—in the payment of debts; and, on taking the accounts against an executor under a creditor's administration judgment, the executor would be disallowed and held personally responsible for any payments to beneficiaries out of the appointed funds, if the creditors remained unpaid.

Under these circumstances I am of opinion that, where an executor receives personal property appointed in pursuance of

(1) 6 Ch. D. 281, 283.

a general power, this property constitutes "assets which he has received as executor," within the meaning of s. 8, sub-s. 3. A different construction of this sub-section would lead to a very curious result: an executor who received the appointed funds would be "accountable" for the estate duty, but yet not "liable," as the assets would not be received by him as executor; and the person to whom the property passed for a beneficial interest in possession would not be liable for the duty under sub-s. 4 of s. 8, because the executor would be "accountable."

If, then, funds appointed under a general power, received by the executor, are "assets which he has received as executor" within the meaning of s. 8, sub-s. 3, it cannot properly be held that the same assets constitute "property which does not pass to the executor as such," within the meaning of s. 9, sub-s. 1. Assets which a person rightfully receives as executor are in my opinion assets which pass to him as executor, within the meaning of this statute, even although not strictly speaking assets to which he is entitled virtute officii.

There are conflicting decisions of judges of first instance upon this question of the incidence of estate duty in respect of appointed funds. Kekewich J., in *In re Treasure* (1) and *In re Maddock* (2), and Byrne J., in *In re Power* (3), take one view; Buckley J., in *In re Moore* (4) and in *In re Dixon* (5), takes the other view. I have, under these circumstances, to express my own opinion. Although personal property subject to a general power of appointment does not pass to an executor by a will containing nothing more than the appointment of an executor—*In re Davies' Trusts* (6); *In re Thurston* (7)—and in some cases where a power is executed by will and an executor appointed it has been considered clear that the appointed property did not pass to the executor virtute officii, yet I am of opinion that where such appointed property is received by an executor, he receives it "as executor" and it

(1) [1900] 2 Ch. 648, 652.
(2) [1901] 2 Ch. 372.
(3) [1901] 2 Ch. 659.
(4) [1901] 1 Ch. 691.
(5) [1902] 1 Ch. 248, 251, 257.
(6) L. R. 13 Eq. 163, 166.
(7) 32 Ch. D. 508.

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passes to him "as such" within the meaning of the Finance Act, 1894.

The result is that in the present case the duty is payable out of residue, and not out of the appointed funds.

I am also of opinion that the will itself imposes this duty upon the residue. The testatrix owned one moiety of the colliery and had a general power of appointment over the other moiety. By her will she directed her trustees to pay her funeral and testamentary expenses and just debts. And, after specifically disposing of the Howley Park colliery and certain lands and hereditaments in the township of Morley, she gave, devised, and bequeathed all her residuary real and personal estate whatsoever and wheresoever. Her residuary estate is what remains after satisfying the previous dispositions made by her will, one of them being the direction to pay her testamentary expenses. The estate duty is a testamentary expense, as was decided by Kekewich J. in *In re Clemow*. (1) It is conceded that the estate duty on the moiety of the colliery which belonged to the testatrix absolutely must fall on residue, and I am of opinion that the duty on both moieties is covered by the direction in the will to pay the testamentary expenses, and that, according to the true construction of the will, testamentary expenses fall on residue.

Solicitors: *C. O. Humphreys & Son; Speechly, Mumford, Rodgers & Craig, for North & Sons, Leeds; Helder, Roberts & Co., for Simpson & Co., Leeds.*

(1) [1900] 2 Ch. 182.

G. R. A.

SWINFEN EADY J.

1902

Dec. 4.

In re SMYTHIES.
WEYMAN *v.* SMYTHIES.

[1902 S. 1923.]

Will—Ademption—General Legacy—Particular Purpose.

A legacy to a trustee for the benefit of an infant, to whom the testator is not in loco parentis, is not given for a particular purpose within *Pankhurst* v. *Howell*, (1870) L. R. 6 Ch. 136, and *In re Pollock*, (1885) 28 Ch. D. 552, 556, so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose.

ORIGINATING SUMMONS.

By a codicil dated June 23, 1896, a testator made the following bequest:—

"I give and bequeath to Mrs. Georgiana Sophia Smythies the legacy or sum of 500*l.* free of all estate or other duty, in trust for my great-niece Eva Marian Smythies for her own sole use and benefit, and I direct that such legacy shall be paid to the said Eva M. Smythies either in whole or in part at such time or times and in such manner as the said Georgiana S. Smythies may in her discretion think fit."

By a settlement dated October 24, 1900, and made between the testator of the one part and Georgiana Sophia Smythies, hereinafter called the trustee, of the other part, after reciting that the testator was desirous of making some provision for his great-niece Eva Marian Smythies, and had paid to the trustee the sum of 500*l.* to be held by her upon the trusts thereinafter contained, the testator declared that the trustee should retain the said sum of 500*l.* in trust to invest the same and to pay or apply the income arising therefrom to or towards the maintenance, education, and benefit of his great-niece until she should attain the age of twenty-four years or marry under that age, and on her attaining that age or marrying to pay the principal to her; and in case of her death before she should have attained the age of twenty-four years or have married to stand possessed of the said sum of 500*l.* and the investments

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thereof in trust for the testator if then living, and if then dead in trust to pay the same to the trustees of his will to be applied by them as part of his residuary personal estate.

The testator, who was not in loco parentis to his great-niece, died on December 18, 1900.

This summons was issued to determine whether the legacy of 500*l.* was adeemed by the subsequent settlement of that amount.

The great-niece was still an infant.

Clare, for the executors and trustees of the will.

Hon. Frank Russell, for the residuary legatees. The legacy was given to the trustee for the use and benefit of the great-niece. That is a particular purpose within the rule of *Roome* v. *Roome* (1), *Debeze* v. *Mann* (2), *Monck* v. *Lord Monck* (3), *Pankhurst* v. *Howell* (4), and *In re Pollock* (5), and the legacy is, therefore, adeemed by the settlement of the same sum for the same purpose, although the limitations are somewhat different.

Brinton, for the great-niece and her trustee. The purpose expressed on the face of the codicil is not a particular purpose within the rule, and there is, therefore, no ademption.

SWINFEN EADY J. (after stating the facts). The legacy of 500*l.* was a general legacy payable out of general personalty, and, no case of loco parentis being made, it was a legacy to a stranger. It is, therefore, not adeemed unless it appears on the face of the codicil to have been given for a particular purpose, which is satisfied by the subsequent settlement. The question is, therefore, whether the legacy to the trustee for the benefit of the great-niece was given for a particular purpose within that rule.

In *Pankhurst* v. *Howell* (4) a testator gave his wife a legacy of 200*l.* to be paid within ten days after his decease. Shortly before his death he gave her 200*l.* in order that she might have a sum of money which she could control immediately on his death, without the interference of the executors. It was

(1) (1744) 3 Atk. 181, 183.
(2) (1789) 2 Bro. C. C. 519.
(3) (1810) 1 Ball. & B. 298; 12 R. R. 33.
(4) L. R. 6 Ch. 136.
(5) 28 Ch. D. 552, 556.

held that the legacy was not adeemed, for that providing the wife with ready money immediately after the testator's decease was not a particular purpose within the rule. In referring to the rule James L.J. says (1): "I think this refers to a legacy given for a particular specific purpose, as for instance a legacy given to purchase an advowson for a son, which would be adeemed, or perhaps it would be more correct to say satisfied, by the father afterwards purchasing the advowson for him." This means that the legacy must not be given merely for bounty, but for a particular specific purpose. In *In re Pollock* (2) Lord Selborne L.C. pointed out that to constitute a particular purpose within the rule, it was not necessary that some special use or application of the money, by or on behalf of the legatee (e.g., for binding him an apprentice, purchasing him a house, advancing him upon marriage, or the like), should be in the testator's view, but that the rule extended to a case where the bequest was expressed to be made in fulfilment of some moral obligation appearing on the face of the will, such as "according to the wish of my late beloved husband."

No authority, however, has been cited to shew that a mere legacy to A. in trust for the benefit of B., an infant, is a legacy for a particular purpose within the rule. In my opinion there is no particular purpose indicated in this codicil, and I therefore hold that the legacy was not adeemed.

Solicitors: *Chester & Co.; Hewlett, Birch-Reynardson & Bucknill.*

(1) L. R. 6 Ch. 138.

(2) 28 Ch. D. 552, 556.

G. R. A.

SWINFEN EADY J.

1902

Dec. 6.

In re SISSON'S SETTLEMENT. JONES *v.* TRAPPES.

[1902 S. 2383.]

Trustee—Title-deeds—Non-negotiable Securities—Custody.

In the absence of special circumstances, a trustee is not entitled to have title-deeds and non-negotiable securities removed from the custody of a co-trustee and placed at a bank, in a box accessible only to the trustees jointly.

ORIGINATING SUMMONS.

This was an application by one of the trustees of a settlement for an order directing his co-trustee to concur with him in placing the deeds and documents of title and securities relating to the trust in a box, accessible only to the trustees jointly, the box to be deposited at a bank approved by the Court.

The documents, which consisted of certificates of railway and other stock standing in the joint names of the trustees, and the title-deeds of a freehold house at St. Asaph, had been for many years in the possession of the respondent, who had kept them in a box in a safe at his solicitor's, retaining the key of the box himself. He had recently removed them to his own house, being advised that this was the proper course. There were no bearer securities.

The position, responsibility, and integrity of the respondent were unimpeachable, and it was not suggested that the documents were in any jeopardy. The applicant had always been given every facility for inspecting the documents at the solicitor's without charge.

The applicant, however, claimed as a matter of strict right to have the documents placed in the joint custody of the trustees, as asked by the summons.

Gatey, for the applicant. I rest my case solely on the strict legal (1) or equitable right of a trustee to have joint custody of the trust securities. This object can only be attained by depositing them at a bank in the joint names of the trustees.

(1) See vide *Foster* v. *Crabb*, (1852) 12 C. B. 136, as to the common law right of one joint tenant to retain possession of title-deeds against the others.

[SWINFEN EADY J. Is there any case in which a trustee has been held liable for leaving certificates or title-deeds in the custody of his co-trustee?]

Trustees were held liable in *Mendes* v. *Guedalla* (1) and *Lewis* v. *Nobbs*. (2)

[SWINFEN EADY J. Those were cases of bearer securities. In the present case the respondent could not deal with the trust property without forgery.]

That is so, and no doubt, as in *Field* v. *Field* (3), the title-deeds might be deposited with the trustees' solicitor for temporary purposes, such as the preparation of leases. But this does not apply to their permanent custody. In *Field* v. *Field* (3) Kekewich J. says: "The general principle, in my opinion, is that trustees must have their muniments of title, as well as their securities, under their own control. . . . They are intrusted with the custody of them, and they are bound within reasonable limits to see that the deeds are kept in a safe place, and that no one else can take them away." After dealing with the question of a deposit with their solicitor for temporary purposes, the judgment proceeds: "If there is a trust shut up for years, as often happens, and there is nothing in it to be done, I do not see why the deeds should not be locked up in a box in a bank or a safe deposit, and the trustees keep the keys, and that is the proper course to pursue. If, on the other hand, they are wanted from time to time, I do not think the trustees are acting unreasonably in giving their solicitor power to do what is right and necessary for the despatch of business. If the particular business comes to an end and there is no further occasion to refer to the deeds, then they can be put into a safe place." In that case both trustees had placed the deeds at their solicitor's, who had frequently to refer to them, and the life tenant objected. It is assumed throughout the case that they were under the joint control of the trustees. A trustee has the right to joint custody of all the trust securities, even though he might not be held liable for not exercising that right in the case of title-deeds and non-negotiable securities. Unless that right exists, it is difficult to see how the question of

(1) (1861) 2 J. & H. 259. (2) (1878) 8 Ch. D. 591.
(3) [1894] 1 Ch. 425, 429, 430.

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negligence in allowing title-deeds to remain in a co-trustee's hands can ever have been raised. (1)

Hewitt, for the respondent. There is no precedent for such an application as this in the case of title-deeds and non-negotiable securities, and as the applicant admits that he has no case on the merits, no order should be made.

SWINFEN EADY J. (after stating the facts). There is no suggestion that the documents are in any jeopardy, or that the applicant has met with any obstruction in inspecting them, or that the trust estate has been put to any costs for inspection. On the contrary, the applicant has been afforded every facility for inspecting the documents without charge.

But the applicant says there is a strict rule entitling him as a matter of legal or equitable right to have the documents kept in a box, which shall not remain in the physical possession of either trustee, but be placed at a bank in their joint names.

I am of opinion that the applicant has no such legal or equitable right, and that no rule hitherto established requires trust documents, consisting of title-deeds and certificates of registered stock, to be put in such a position that no trustee can even look at them without the presence or concurrence of his co-trustees, as would be the case if they were placed at a bank in a box to which each trustee had a different lock and key. Such a rule would greatly impede the execution of trusts. The applicant's case and the respondent's opposition are based simply on their strict legal or equitable rights. The applicant has made no case whatever for removing the documents from their present custody, where they have remained for many years in perfect safety, and where, so far as I can see, they are perfectly safe.

Under these circumstances I make no order beyond giving the respondent costs out of capital.

Solicitors: *Hamlin, Grammer & Hamlin, for Gamlin & Williams, Rhyl; Stow, Preston & Lyttelton, for J., W. & T. Eastham, Clitheroe.*

(1) See, for instance, *Cottam* v. *Eastern Counties Ry. Co.*, (1860) 1 J. & H. 243.

G. R. A.

In re BRACKEN'S SETTLEMENT.

SWINFEN EADY J.

1902 Dec. 6.

[1902 B. 2520.]

Settled Land—Exchange of Easements—Settled Land Act, 1890 (53 & 54 *Vict.* c. 69), s. 5.

The Settled Land Act, 1890, s. 5, authorizes an exchange of easements, apart from any exchange or partition of land.

ORIGINATING SUMMONS.

This was an application by the equitable life tenant of an estate settled in trust for sale asking for leave to exercise the powers of the Settled Land Acts, and in particular for leave to grant an easement over the settled land in exchange for an easement over other land.

Henry Fellows, for the life tenant. The only question is whether an exchange of easements pure and simple is within the Settled Land Act, 1890, s. 5, which provides that "On an exchange or partition any easement right or privilege of any kind may be reserved or may be granted over or in relation to the settled land or any part thereof or other land or an easement right or privilege of any kind may be given or taken in exchange or on partition for land or for any other easement right or privilege of any kind."

It has been doubted amongst conveyancers whether the section applies unless there is an exchange or partition of land, the opening words, which primâ facie refer to land, and not easements, being considered to govern the whole section.

Now the Settled Land Act, 1882 (45 & 46 Vict. c. 38), with which the Act of 1890 must be read, contains the following provisions as to exchanges, partitions, and easements:—

Sect. 3 provides for sale, enfranchisement, exchange, or partition of land, but only authorizes easements to be sold.

Sect. 4 contains regulations as to sale, enfranchisement, exchange, or partition, but only authorizes easements to be regranted on enfranchisement.

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Sect. 6 provides for the lease of land or easements.

Sect. 17 provides for the grant or reservation of easements for mining purposes on a sale, exchange, partition, or mining lease.

Sect. 21, sub-s. viii., authorizes capital money to be applied in purchase of any easement convenient to be held with the settled land for mining or other purposes.

An easement could, therefore, be sold, leased, or purchased, but could not be granted or reserved in cases of exchange or partition of land except for mining purposes.

It is suggested that s. 5 of the Act of 1890 was passed to remedy this defect, and that it presupposes an actual exchange or partition of land.

The point came before Buckley J. in chambers, but was not decided, the difficulty being avoided by adopting his suggestion that two small pieces of land should be exchanged.

[SWINFEN EADY J. The difficulty might also be avoided by cross-purchases of the easements.]

Yes. But in this case all the terms have been arranged, and the parties would prefer to carry out the exchange of easements as asked by the summons.

[SWINFEN EADY J. How do you punctuate the section?]

By placing a comma after the words "or other land."

Philbrick Walker and *Bowen Davies*, for the trustees, did not oppose the application.

SWINFEN EADY J. I think it is clear that the opening words "on an exchange or partition" do not govern the whole section. In my opinion, the section should be read as if a comma preceded the words "or other land"; but, whether it precedes or follows those words, I think the remaining words of the section are an independent clause authorizing an exchange of easements apart from any exchange or partition of land. I give leave accordingly.

Solicitors: *Whitfield & Harrison, for Humphreys, Hirst & Whitley, Halifax; Walker & Rowe, for F. Walker & Son, Halifax.*

G. R. A.

Considered. Re GEORGE. [1949] 1 Ch. 154

In re JAQUES. HODGSON *v.* BRAISBY.

[1901 J. 1760.]

C. A. 1902 Dec. 12, 13, 15.

Will—Construction—Double Portions—Parent and Child—"Advances"—Legacy—Personal Estate, Gift of—Share of Residue—Real Estate, Subsequent Purchase of—Satisfaction—Ejusdem Generis—Ademption.

A testamentary direction that the testator's married daughter should not take the benefit of a specific devise to her of real estate or her share of his residuary personal estate "without first bringing into hotchpot as part of my residuary personal estate the total amount of any advances or moneys lent by me to my said daughter and her husband, or either of them":—

Held, upon the construction, affirming Buckley J., not to include real estate subsequently purchased by the testator for the benefit of his daughter and her husband, and by his direction conveyed, as to part, to the daughter, and, as to the rest, to the husband; or any moneys expended, also for their benefit, upon the real estate so purchased.

The rule established by *Holmes* v. *Holmes*, (1783) 1 Bro. C. C. 555—that the presumption against double portions will not prevail where the testamentary portion and subsequent advancement are not ejusdem generis—has been left untouched by modern decisions.

The observations of North J. in *In re Vickers*, (1888) 37 Ch. D. 525, 534, upon *In re Lawes*, (1881) 20 Ch. D. 81, dissented from.

JOHN JAQUES, formerly a dairyman and latterly a hay and manure dealer, by his will dated March 31, 1897, after appointing his wife and two other persons his executors and trustees, and making a specific devise to his daughter Annie Todd for life, devised certain freehold houses in Kingston-upon-Hull upon trust for his daughter Elizabeth Jaques during her life; and he gave his residuary real and personal estate to his trustees, upon trust for sale and to stand possessed of the net proceeds upon trust, as to two equal third parts or shares thereof, for his said daughters Annie Todd and Elizabeth Jaques in equal shares absolutely, and as to the remaining third part thereof, upon certain trusts for the children of a deceased daughter; and he directed that his said real estate devised in favour of each of his said daughters during her life should, after her death, be held upon trust for her children in equal shares, on their respectively attaining the age of twenty-one years, with

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divers remainders over in favour of his surviving daughter and grandchildren in the event of either of his said daughters dying without leaving children her surviving, or, if leaving such, they should all die under twenty-one; and he declared that his residuary trust estate from and after his death, as also his real estate thereinbefore specifically devised, when required for the purposes of division amongst the children of any of his said daughters, should be considered in equity as converted into personalty, and be dealt with accordingly.

Shortly after the date of the will the testator's daughter Elizabeth Jaques married John Robert Braisby, a small farmer. Thereupon, on May 26, 1899, the testator made a codicil, whereby, after making specific devises of certain real estate he had purchased since the date of his will, the testator declared that, notwithstanding the trusts in his will contained concerning his residuary real and personal estate, his trustees should hold the share or shares thereof, whether original or accruing, bequeathed to his daughter Elizabeth Braisby, upon such and the same trusts as were by his said will declared concerning the real estate specifically devised in her favour. And after declaring that the said Elizabeth Braisby should have no power of anticipation over the provisions in her favour in the said will and codicil contained during coverture, the testator declared that the said Elizabeth Braisby, or the persons claiming the real estate specifically devised and the share of and in his residuary real and personal estate bequeathed by his said will in her favour or by the said codicil directed to be held in trust for her during her life, should not, nor should either or any of them, participate in the benefit of such devise and bequest, direction or trust, "without first bringing into hotchpot as part of my residuary personal estate the total amount of any advances or moneys lent by me to the said Elizabeth Braisby and her said husband, or either of them, since their marriage."

On October 17, 1900, the testator made a second codicil whereby, after making a further provision for his said daughter Annie Todd by a specific devise to her of one of his houses in Kingston-upon-Hull, he in all other respects confirmed his will and first codicil.

The testator died on March 27, 1901.

On June 10, 1899—that is, between the dates of the two codicils—the testator purchased a freehold piece of land at Reedness, Yorkshire, with a house and farm buildings thereon, for 520*l.*, and had the same conveyed to his daughter Elizabeth Braisby in fee simple, the purchase-money being found by himself.

On April 6, 1900, again between the dates of the two codicils, he purchased another freehold piece of land at Reedness for 60*l.*, and had it conveyed to his son-in-law John Robert Braisby in fee simple, the testator again finding the money. It appeared that on both occasions the testator informed his daughter and son-in-law of his proposal to make the purchases, saying he wished to find them a suitable residence and a small farm. The purchase-moneys were never repaid to the testator, nor did he ever ask for them.

During the years 1899 and 1900 the testator made on behalf of Mr. and Mrs. Braisby various further payments, amounting in all to 169*l.*, for repairs to the house he had so purchased for them, and for certain live and dead stock for the small farm.

These payments also appeared to have been made by him voluntarily, and Mr. and Mrs. Braisby were, neither of them, ever asked by him to repay the same, nor did they ever do so. After the testator's death the question arose whether Mr. and Mrs. Braisby were entitled to the benefit of the property and payments so purchased and made, and also to their respective interests under the will and codicils, without bringing such property and payments into hotchpot or accounting for the same.

In order to have that question decided, an originating summons was taken out by the testator's sole executor and trustee against Mr. and Mrs. Braisby, their two infant children, and Mrs. Annie Todd, who was a widow, as being persons claiming to be beneficially interested in the testator's real and personal estate, for the determination of the questions whether the purchase-moneys for the property purchased by the testator and conveyed to Mr. and Mrs. Braisby respectively, and the other

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moneys paid by him to them or for their benefit, were to be regarded as "advances or moneys lent" within the meaning of the first codicil, and to be brought into hotchpot. Buckley J. held that none of the purchase or other moneys ought to be regarded as "advances or moneys lent," and made a declaration accordingly.

The defendant Mrs. Todd appealed.

The appeal was heard on December 12, 13, and 15, 1902.

Upjohn, K.C., and *A. H. Jessel*, for the appellant Mrs. Todd, contended that the word "advances" in the first codicil should be construed in the technical sense as meaning advances of portions, and that the case came within the rule of the Court against double portions: Statute of Distributions (22 & 23 Car. 2, c. 10), s. 3; *Ex parte Pye* (1); *Pym* v. *Lockyer* (2); *Montefiore* v. *Guedalla* (3); *Auster* v. *Powell* (4); *Taylor* v. *Taylor* (5); *Montagu* v. *Earl of Sandwich* (6); *In re Lacon* (7); *In re Scott.* (8) The decision in *Holmes* v. *Holmes* (9)—that an advance, in order to be a satisfaction of a debt or legacy, must be of something ejusdem generis—has been overruled by the Court of Appeal in *In re Lawes* (10), and by North J. in *In re Vickers* (11), both of which cases precisely cover the present; so that, according to the present law, an advance, to be a satisfaction of a debt or legacy, need no longer be of something ejusdem generis.

[COZENS-HARDY L.J. I think North J. misunderstood the decision in *In re Lawes.* (10)]

The still more recent decision of Romer J. in *In re Lacon* (7) also supports our view.

Warrington, K.C., and *R. J. Parker*, for the defendants Mr. and Mrs. Braisby. The question here is entirely one of the construction of this will and codicil: the general doctrine

(1) (1811) 18 Ves. 140, 151; 11 R. R. 173.
(2) (1840) 5 My. & Cr. 29, 35, 46; 48 R. R. 219.
(3) (1859) 1 D. F. & J. 93.
(4) (1863) 1 D. J. & S. 99.
(5) (1875) L. R. 20 Eq. 155.
(6) (1886) 32 Ch. D. 525.
(7) [1891] 2 Ch. 482, 487.
(8) Ante, p. 1.
(9) 1 Bro. C. C. 555.
(10) 20 Ch. D. 81.
(11) 37 Ch. D. 525.

against double portions has no application to the case at all. Upon the language used by the testator it is clear that he was contemplating payments of money—whether by way of loan or by way of advance in the sense of loan—that might be made by him in his lifetime; any such payments were to be brought into hotchpot "as part of my residuary personal estate." The words cannot apply to a gift of a house or land.

E. S. Ford, for the infant defendants.

VAUGHAN WILLIAMS L.J. We think the judgment of Buckley J. must be affirmed. This is not a case in which the law of double portions has to be discussed directly. This testator has made his own rule, and all we have to do is to construe a clause in his first codicil. [His Lordship read the clause above quoted, and also the material parts of the will. He then stated the facts as to the purchase of the pieces of land by the testator for the benefit of his daughter Mrs. Braisby and her husband, and the conveyance thereof to them respectively, and continued:—]

The sole question we have to decide is whether or not the land so conveyed by the testator to his daughter and her husband must, by the words of the first codicil, be taken to have been "advances or moneys lent" to the daughter or her husband. In my judgment we cannot so construe those words as to make them include these portions of real estate so conveyed by him. [His Lordship then discussed the language of the will and first codicil, and referred to the evidence as to the circumstances under which the purchases had been made by the testator, as shewing that the construction contended for could not be supported, and that the construction adopted by Buckley J. was right. He then proceeded:—]

It was strongly urged upon us in argument that upon this doctrine of double portions there had been a great change in the law in consequence of the decision of Sir G. Jessel and the other members of the Court of Appeal in *In re Lawes* (1), and of the observations made upon it by North J. in *In re Vickers*. (2) I do not assent to that argument. I do not think that Sir G.

(1) 20 Ch. D. 81. (2) 37 Ch. D. 525.

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Jessel at all meant to overrule *Holmes* v. *Holmes* (1), or the old doctrine which was based upon it. On the contrary, I think he meant to affirm it. It is quite true that he discusses *Holmes* v. *Holmes* (1), but in this way. First of all, he says, referring to that case (2): "It is said that that case decided that a share in stock-in-trade was not a satisfaction of a pecuniary legacy, and taking the report as it stands, it is impossible to say that it was not so decided. Still, I am not prepared to say that even a share in a stock-in-trade, if declared to be taken at a specific value, would not be a satisfaction of a portion; but I cannot discover from the report, which is very brief, what the facts really were." Then he proceeds to discuss another case, *Bengough* v. *Walker* (3), and says: "I agree that some of the criticisms on it made by the counsel for the appellant were well founded, and the report is certainly not quite satisfactory, but I think we can find out what Sir W. Grant really meant. A father gave to his child a share of a mill, and directed it to be made up to the value of 10,000*l.*, and it was held that was a satisfaction of a portion of 2000*l.* The question argued was whether a share of a mill could be a satisfaction of a legacy, because a legacy must be satisfied by something of the same kind." Then he reads this passage from Sir W. Grant's judgment in that case (4): "But it is to be observed that in none of those cases did the party making the advance or the bequest ever make either with reference to a definite amount to which he intended it should reach. They are all cases in which the testator without reference to the pecuniary value of the thing he was giving, has given it; and the question was, whether, as upon entering into a computation of the value of the thing given, it turned out equal to the portion or the legacy, it should be taken as a satisfaction; the testator not having indicated any idea of his own whether it was or was not correspondent in value to the debt which he owed, or the legacy he gave. Those cases, therefore, would not precisely apply."

Now comes Sir G. Jessel's comment upon that (5): "The

(1) 1 Bro. C. C. 555.
(2) 20 Ch. D. 87.
(3) (1808) 15 Ves. 507; 10 R. R. 106.
(4) 15 Ves. 512.
(5) 20 Ch. D. 88.

true meaning of that is, that where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but where he does refer to the value the presumption of satisfaction may arise."

When North J. came to deliver his judgment in *In re Vickers* (1), after reading the last passage I have just read from Sir G. Jessel's judgment, he says (2): "Now what I understand him (Sir G. Jessel) to be doing is to be commenting on the meaning of language used by a former judge in a case decided at a time when it was considered that a gift of something to go in ademption of a legacy must be something that would satisfy the legacy altogether and not pro tanto, and he is not expressing his own view of the law at the time he was speaking. The view of the Master of the Rolls and of the whole Court in that case was that the gift of a share in a business, in that case more valuable than a legacy, was of itself sufficient to adeem the legacy, and that the rule that there is a primâ facie presumption against double portions applied, and that in that case there was nothing to rebut it."

With all deference to North J., whether one looks at the judgment of the Master of the Rolls, or at that of Lush L.J. or of Lindley L.J., in *In re Lawes* (3), it is quite plain that the basis of their judgments was that the share given to the son by the partnership articles was valued by the father and intended to be taken by the son as so much money. Lush L.J., after saying it was clear that in accepting the share, which was admittedly worth 19,000*l.*, the son took it in satisfaction of the father's bond debt of 10,000*l.*, adds: "It was equivalent to the father saying, I give you 19,000*l.* in money if you will agree to put it into the business." Then Lindley L.J. says: "The father gives his son 19,000*l.* He gives it in money—not in cash, but in what is to be taken as so much money." It seems to me, therefore, with deference to North J., that neither Sir G. Jessel M.R. nor the two Lords Justices intended in that case to depart from the law as laid down in the earlier

(1) 37 Ch. D. 525. (2) 37 Ch. D. 534. (3) 20 Ch. D. 81, 89.

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authorities—that an advance must, in order to be a satisfaction of a debt or legacy, be ejusdem generis. I do not wish to say anything more, except to point out that the view we take of this case leaves the statement of the law in Williams on Executors, 9th ed. p. 1197, which is based upon *Holmes* v. *Holmes* (1), untouched. This appeal must be dismissed.

STIRLING L.J. I am of the same opinion. The decision in this case turns upon the construction which is to be placed on the words used by the testator in his first codicil, and particularly on the word "advances." We are asked to read that word in the sense of the expression "advancement by portion," which is found in the marginal note to s. 3 of the Statute of Distributions (22 & 23 Car. 2, c. 10), as published in the Revised (2nd) Edition of the Statutes, vol. i. p. 658. In my opinion, the word is susceptible of that meaning, which was the meaning in which the word was used by Lord Eldon in *Ex parte Pye* (2) and in Lewin on Trusts, 10th ed. p. 464. That, however, is not the primary meaning: the word primarily refers to advances of money. An advance of money is commonly spoken of, and the expression is perfectly intelligible to every one; but an advance of a house or a chattel would not be understood without explanation by any one but a lawyer. The construction we are asked to adopt of the word should not be adopted unless there is a context to justify it; and here, in my opinion, the context points in a different direction. The advance is to be brought in as part of the testator's personal estate, and it is the amount, not the value, of the advance which is to be brought in. Reading the codicil in connection with the will, there is, in my opinion, not sufficient to justify the construction sought to be put upon the word "advances." It is said that this is to give no effect to the word "advances" as opposed to "moneys lent." I do not think so; the word covers payments by the testator which were not in the nature of moneys lent, but rather of moneys paid at the request of the legatee: see, for example, *Auster* v. *Powell*. (3)

(1) 1 Bro. C. C. 555.
(2) 18 Ves. 140, 151; 11 R. R. 173.
(3) 1 D. J. & S. 99.

As to the contention that there has been some change in the law with reference to the doctrine of double portions, I agree with what has been said by Vaughan Williams L.J. I cannot myself read the judgment of Sir G. Jessel M.R. in *In re Lawes* (1) in the sense in which North J. read it in *In re Vickers*. (2) In my opinion this appeal must be dismissed.

COZENS-HARDY L.J. I agree. The case seems to turn upon the language used by the testator in the particular clause, which has been referred to, in his first codicil. Upon that I need not say more than that I agree with the view expressed by my learned brethren. It appears to me that the doctrine of double portions has no application here, but I desire to say that I entirely agree with what has been said with regard to the judgments of the Court of Appeal in *In re Lawes* (1), and with regard to the view of them taken by North J. in *In re Vickers* (2) The decision of North J. in that case seems to me to have been correct, but I cannot adopt his criticism of the language used by the Court in *In re Lawes*. (1)

Solicitors: *McDiarmid & Hill, for R. Davis, Hull; Rollit & Sons, for Shackles & Dunkerly, Hull.*

(1) 20 Ch. D. 81. (2) 37 Ch. D. 525, 534.

G. I. F. C.

C. A.
1902
Dec. 19.

In re ALLAN.
DOW *v.* CASSAIGNE.

[1902. A. 55.]

Will—Construction—Share of Residue—Direction that on Failure of Trusts of any Share it should "fall into Residue"—Survivorship—Accruer—Intestacy.

A testator gave his residuary estate to trustees in trust for sale and investment of the proceeds, and to hold the investments, as to one-fourth part thereof, in trust for one of his four daughters for life with remainder to her children living at her death, or the issue of any child dying in her lifetime; and as to the other three-fourths upon similar trusts for his other three daughters, their children or issue; and he declared that, if any one or more of his said daughters should die without leaving issue, their share or shares "shall fall into and become part of my residuary estate, and be held and disposed of on the same trusts as are hereinbefore declared thereof."

Held, following *In re Palmer*, [1893] 3 Ch. 369, which overruled *Humble* v. *Shore*, (1847) 7 Hare, 247; 1 H. & M. 550, n., that upon the death of any daughter without issue her share, both original and accrued, went over to the surviving daughters respectively upon the same trusts as their original shares.

Robert Allan, by his will dated September 25, 1843, after bequeathing certain pecuniary legacies, gave the sum of 2000*l.* to his trustees upon trust to invest the same as therein mentioned, and to pay the income thereof to his daughter Elizabeth Dow, the wife of Jonathan Duncan Dow, during her life for her separate use; and the testator directed that after her death the trustees should stand possessed of the investments "in trust for all and every the children and child of the said Elizabeth Dow living at her decease, equally to be divided between them, if more than one, share and share alike; and in case there shall be only one such child, then in trust for such only child: provided always, and I do hereby direct that in case any one or more of the children of the said Elizabeth Dow shall die in her lifetime leaving lawful issue, then such issue shall have and be entitled to the share of the said trust stocks, funds, and securities which his, her, or their parent or parents would have been entitled to if he or she had survived

the said Elizabeth Dow, equally to be divided between such issue, if more than one, share and share alike." And the testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale, conversion, and investment, and to stand possessed of the investments, "as to one equal fourth part thereof, on trusts for the separate use of my daughter Marion Harriett during her life, and after her decease for the benefit of her children and child, similar to those declared in favour and for the benefit of my said daughter Elizabeth Dow and her children or child in respect of the 2000*l.* bequeathed in trust for her and them, with the like proviso in favour of the lawful issue of any child of my said daughter Marion Harriett dying in her lifetime; and as to one other fourth part of my said residuary estate on similar trusts for the separate use and for the benefit of my daughter Charlotte and her children and child and the lawful issue of any child dying in her lifetime"; and as to one other fourth part upon similar trusts for his daughter Sophia Henrietta, her children and issue; and as to the remaining fourth part in trust during the joint lives of his daughter Eleanor and her then husband, George Mence, to invest and accumulate the income, and in case she survived her husband, to stand possessed of such one-fourth and the accumulations thereof on trusts for the separate use and benefit of herself and her children, except any she might have by the said George Mence, and the issue of any dying in her lifetime, similar to those declared in favour of his other daughters with respect to their respective shares. Then the testator proceeded: "I declare that if any one or more of my said daughters, Marion Harriett, Charlotte, and Sophia Henrietta, shall die without leaving any child, or the issue of a child lawfully begotten, living at their respective deceases, or if my said daughter Eleanor shall die without leaving any child or issue of a child by any husband other than the said George Mence, the shares or share of my said daughters or daughter so dying shall fall into and become part of my residuary estate, and be held and disposed of on the same trusts as are hereinbefore declared thereof."

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The testator died on June 30, 1847, possessed of personal estate only.

Charlotte Allan died in 1864 a spinster. Eleanor Mence, who survived her husband G. Mence and married Edward Fagan, died on April 15, 1874, without leaving issue, except by her first marriage, the issue of which were excluded by the will from participation in her share of the residuary estate.

Marion Harriett Allan married John George Cassaigne and died on December 5, 1901, her only issue surviving her being a granddaughter, Marion Beatrice Cassaigne.

The testator's remaining daughter, Sophia Henrietta Allan, married Hew Dalrymple, whom she survived. She was now still living. She had never had a child, and was now eighty-five years of age, in consequence of which it was proposed that a final distribution should be made of the testator's residuary estate. Questions then arose as to the effect of the accruer clause in the residuary gift—whether on the death of the first daughter, Charlotte, without issue her share went over to her three surviving sisters equally upon the same trusts as their original shares, or whether, upon the authority of *Humble* v. *Shore* (1), her share became divisible in fourths, the share of Charlotte, that is, one-sixteenth of the entirety, being undisposed of by the testator, and therefore passing to his next of kin, and the remaining three-fourths, i.e., three-sixteenths of the entirety, going to the three surviving sisters respectively by way of accruer to and upon the same trusts as their original shares; and whether the same result, with the like process of further sub-division, followed as to the share, both original and accrued, of any other of the four daughters dying without issue.

To have these questions decided, an originating summons was taken out by the present sole trustee of the will against Marion Beatrice Cassaigne, Mrs. Cassaigne's only surviving issue, Mrs. Dalrymple, the testator's sole surviving daughter and one of his next of kin, and William Harness Simpson, an executor of Mrs. Cassaigne who was also one of the testator's next of kin, the defendant Simpson being made a party for the purpose of contending that there was an intestacy both on the

death of Mrs. Cassaigne and on the deaths of Charlotte Allan and Eleanor Fagan.

The summons asked for the determination of the following questions of construction: (1.) Who became entitled, upon the death of Charlotte Allan, to the one-fourth share to the income of which she was entitled during her life in the testator's residuary estate, and in what shares and for what interests; (2.) who became entitled, upon the death of Eleanor Fagan, to (*a*) the original one-fourth share to the income of which she was entitled during her life in the said residuary estate, and (*b*) any accrued share to the income of which she was entitled therein, and in what shares and for what interests; and (3.) who became or was now entitled to the testator's residuary estate and the income thereof upon the death of Mrs. Cassaigne leaving no issue except her granddaughter, the defendant Marion Beatrice Cassaigne.

Buckley J. held, apparently following *Humble* v. *Shore* (1), that upon the death in 1864 of Charlotte Allan one-fourth of her original fourth passed to the testator's next of kin as undisposed of: (that is to say) one-sixteenth of the entirety passed to the next of kin, one-sixteenth, as an accrued share, to Eleanor Fagan, deceased, for life, one-sixteenth, as an accrued share, to Marion Harriett Cassaigne, deceased, for life, and one-sixteenth, as an accrued share, to the defendant Sophia Henrietta Dalrymple for life. And the learned judge further held that on the death on April 15, 1874, of Eleanor Fagan without issue (except by her first husband, George Mence) her original one-fourth passed, as to two-fourth parts thereof, or two-sixteenths of the entirety, as a further accrued share, to Marion Harriett Cassaigne for life, and as to the remaining one-fourth thereof, or one-sixteenth of the entirety, as a further accrued share to the defendant Sophia Henrietta Dalrymple for life; and that on the death of Eleanor Fagan the one-sixteenth of the entirety in which she had a life interest as an accrued share passed to the testator's next of kin; and further that, on the death of Marion Harriett Cassaigne, her accrued two-sixteenth shares as well as her original one-fourth share

(1) 7 Hare, 247; 1 H. & M. 550, n.

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passed to her grandchild, the defendant Marion Beatrice Cassaigne; and that, on the death of the defendant Sophia Henrietta Dalrymple without issue, the testator's next of kin would become entitled to her accrued two-sixteenth shares and to three-fourths of her original four-sixteenth shares (five sixteenths in all), and that the remaining one-sixteenth would pass to the defendant Marion Beatrice Cassaigne. His Lordship made an order containing declarations accordingly.

In delivering judgment, his Lordship said he should have been very glad if he could have seen his way to follow *Crawshaw* v. *Crawshaw* (1), which was very near the present case, and to have adopted what Jessel M.R. there called, and rightly, the "rational view"; but that that case seemed to have been decided on special grounds, which unfortunately were not applicable to the present case.

In his judgment Buckley J. did not make any reference to the decision of the Court of Appeal in *In re Palmer* (2), which expressly overruled *Humble* v. *Shore*. (3)

The defendant Marion Beatrice Cassaigne appealed from the order, and by her notice of appeal asked for declarations to the effect that upon the death of Charlotte Allan her one-fourth went over to her three sisters in thirds, upon the trusts declared by the will of their original fourths respectively; that on the death of Eleanor Fagan her original fourth and her accrued share went over to her two surviving sisters equally, upon the trusts declared of their original fourths respectively; and that upon the death of the defendant Sophia Henrietta Dalrymple without issue, she, the defendant Marion Beatrice Cassaigne, would become entitled absolutely to Mrs. Dalrymple's original one-fourth, and also to her accrued shares.

The appeal was heard on December 19, 1902.

MacSwinney, for the appellant, the defendant Marion Beatrice Cassaigne. The intention of the testator, as indicated by the language he has used, was, it is submitted, to preserve the residue as an aggregate fund, so that on the death of any

(1) (1880) 14 Ch. D. 817; 29 W. R. 68.

(2) [1893] 3 Ch. 369.

(3) 7 Hare, 247; 1 H. & M. 550, n.

daughter without issue her share would go over to her sisters equally, upon the same trusts as their original shares. The result is that on the death of Mrs. Dalrymple, the only sister now living, my client takes the whole absolutely. The testator never could have intended that on the death of each daughter her share, both original and accrued, should be split up ad infinitum, with a fraction remaining undisposed of upon each death. That is the absurd result of the decision in *Humble* v. *Shore* (1) by Wigram V.-C., affirmed by Lord Cottenham L.C.; and judges of first instance in subsequent cases, not being able to overrule that decision, got round it by resorting to subtle distinctions: *Crawshaw* v. *Crawshaw* (2); *In re Ballance* (3); *Re Owen* (4); *Holgate* v. *Jennings*. (5) Ultimately the point came before the Court of Appeal in *In re Palmer* (6), when *Humble* v. *Shore* (1) was finally overruled in express terms. *In re Palmer* (6) was, for some reason or other, not dealt with at all by the learned judge in delivering judgment in the present case; but it must now be regarded as laying down decisively that where a testator directs that on the happening of a certain event a share of residue "shall fall into and form part of his residuary estate," the whole of that share goes over and forms an accretion to the other shares, and no part of it is to be regarded as undisposed of. In fact, by holding that there is an intestacy as to any part of the share, you disregard the testator's express direction that it shall all fall into residue.

The construction in *In re Palmer* (6) gives effect in such cases to the manifest intention of the testator, and gets rid of mathematical sub-divisions and endless complications which could never for one moment have entered his mind.

Champernowne, for the defendant Mrs. Dalrymple, whose interest was conflicting, took no part in the argument.

Medd, for the defendant Simpson, representing the testator's next of kin. First, taking the language of the will itself, the words of the accruer clause are important, for upon the death

(1) 7 Hare, 247; 1 H. & M. 550, n.
(2) 14 Ch. D. 817; 29 W. R. 68.
(3) (1889) 42 Ch. D. 62.
(4) (1892) 36 Sol. J. 539.
(5) (1893) 37 Sol. J. 303.
(6) [1893] 3 Ch. 369.

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of a daughter without issue her share is to fall into the residue and be held "on the same trusts as are hereinbefore declared thereof"—that is, of the residue; and the only trust of each share of residue is for the life of a daughter with remainder to her children. There is to be no second carrying over: the accruer clause cannot, according to the well-established rule, operate twice. Thus, if one of the three daughters dies without issue, her share goes over and the accruer clause stops: when the share has got to the remaining three daughters, it goes no further. Therefore, by simply following the testator's actual words, instead of speculating upon his intention, you do get an intestacy. The important point is, as Lindley L.J. said in *In re Palmer* (1), to construe the expressions the testator has used.

Turning, now, to the authorities cited; in *Crawshaw* v. *Crawshaw* (2) the decision of Jessel M.R. was based upon the particular circumstances of that case. *In re Ballance* (3) was decided upon the footing of there being an executory trust of the residue in favour of a class, whereas here there is a specific gift in favour of each of the testator's four daughters nominatim. In *Re Owen* (4) there was not merely a direction that a settled share of residue should in a certain event fall into the residue, the other shares of which were settled, but there were the additional words, "as near thereto as circumstances will then admit"; being a clear indication that at the time of the event happening the share should go over to the other settled shares, as residue, in the state or circumstances in which they then were.

Holgate v. *Jennings* (5) was another case of a gift to a class, not to individuals.

In re Palmer (1) does, no doubt, alter the supposed rule in *Humble* v. *Shore*. (6)

[VAUGHAN WILLIAMS L.J. All the previous cases were struggles to get out of that rule.]

In *Humble* v. *Shore* (6) there was no actual rule: the case

(1) [1893] 3 Ch. 369, 373–4.
(2) 14 Ch. D. 817; 29 W. R. 68.
(3) 42 Ch. D. 62, 65.
(4) 36 Sol. J. 539.
(5) 37 Sol. J. 303.
(6) 7 Hare, 247; 1 H. & M. 550, n.

only applied to wills containing the same words; it would never have been applied to such a case, for example, as *Re Owen*. (1) The present case is distinguishable from *In re Palmer* (2) by the language of the accruer clause.

MacSwinney, in reply. The decision in *In re Palmer* (2) is sufficient for me on the main point.

[VAUGHAN WILLIAMS L.J. mentioned *Creswell* v. *Cheslyn*. (3)

COZENS-HARDY L.J. *In re Palmer* (2) does not appear to deal with accruer.]

The question of accruer, though not actually decided in that case, is within the scope of the decision. The object of the testator here is to keep the residue as an integral fund. If the Court were to hold that part of that fund is undisposed of, that would not be giving effect to the testator's full intention. He could not have intended that the original share should go over, and that the accrued share should not. He must have meant that the whole should go over.

[VAUGHAN WILLIAMS L.J. The general rule of construction as to the effect of a claim of survivorship or accruer, together with the exception from it, is stated by Sir T. Plumer M.R. in *Barker* v. *Lea*. (4)]

The present case clearly falls within the exception, as there stated, from the general rule.

Rashleigh, for the plaintiff.

VAUGHAN WILLIAMS L.J. I do not think that the judgment of Buckley J. in this case can be supported. In my opinion, with the exception I will presently mention, the case of *In re Palmer* (2) disposes of this question absolutely. Buckley J. did not, apparently, in the course of his judgment, make any reference whatsoever to that case. His decision was one which might very well have been pronounced at a time when it was doubtful whether *Humble* v. *Shore* (5), and the other cases which followed it, did not continue to be law. But it is no longer necessary for judges to draw fine distinctions in order

(1) 36 Sol. J. 539.
(2) [1893] 3 Ch. 369.
(3) (1762) 2 Eden, 123.
(4) (1823) T. & R. 413, 415; 24 R. R. 85, 87.
(5) 7 Hare, 247.

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to avoid following *Humble* v. *Shore* (1), for that case has been directly overruled in terms by the Court of Appeal in *In re Palmer*. (2) I need not do more than refer to the head-note of that case, which is as follows: "A testator by his will gave his residuary real and personal estate upon trust as to two fifth parts for his daughters M. and A., and all other daughters born in his lifetime equally. By a codicil he declared that the share given to M. should be restricted to a life interest only, and that upon her death it should fall into and form part of his residuary estate: *Held*, that the share of M. after her death did not pass to the testator's next of kin as undisposed of, but was divisible between the other residuary legatees. *Humble* v. *Shore* (1) overruled." That seems to me to be clearly applicable to the present case, and we must follow the rule there laid down.

The only other matter to which I propose to refer is the point that was made by Mr. Medd with reference to the accrued shares. The clause in the will that he read, and relies upon, runs thus: [His Lordship then read the declaration above quoted, and continued:—] Mr. Medd says that the closing words, "hereinbefore declared thereof," cannot mean to include that which is included in this clause itself, but that "hereinbefore" must mean that which appears in this will antecedently to this clause. I do not at all mean to say that that is not a possible, and even a natural, construction of these words; but, in my opinion, we ought not so to deal with this case. This is a case in which, although there are both original shares and accrued shares, which in a testamentary instrument may very often be dealt with in different ways, it is obvious that the intention of the testator was to create one aggregate fund, and to dispose of that absolutely. I read in the course of the argument a passage from the judgment of Sir T. Plumer M.R. in *Barker* v. *Lea* (3), in which he said: "Where distinct legacies are given with survivorship, the general rule is, that the clause of survivorship, unless extended by particular words, attaches only to the original shares and does not affect the accruing

(1) 7 Hare, 247. (2) [1893] 3 Ch. 369.
(3) T. & R. 413, 415; 24 R. R. 85, 87.

shares, which therefore become vested in the individuals who are the survivors for the time being . . . . The principal exception is, where the disposition is, not of separate legacies, but of one aggregate fund, which the testator meant should remain an aggregate fund, and should not be broken into fragments, if some of the persons, to whom interests in it were given, happened to die." Here it seems to me to be manifest, following the words of Sir T. Plumer, that the disposition is of one aggregate fund which the testator meant should remain an aggregate fund, and should not be broken into fragments if some person to whom interests in it were given happened to die. Under those circumstances, it seems to me that the only difficulty which was raised in this case disappears, and that we must dispose of the case in the way in which the Court is bound now, since *In re Palmer* (1), to dispose of such cases. The appeal must, therefore, be allowed.

STIRLING L.J. I am entirely of the same opinion. I am unable to agree with the judgment of Buckley J. because it leads to a conclusion which is directly opposed to the decision of the Court of Appeal in the case which has been referred to of *In re Palmer*. (1) In that case, as has been pointed out, the testator by his will gave his residuary estate as to two-fifth parts to his two daughters, whom he named, and all other daughters born in his lifetime equally. Then, by a codicil, he declared that, as to one of the daughters, her share should be confined to a life interest only, and that upon her death it should fall into and form part of his residuary estate. The question was, What should be done with the share of that daughter upon her death? The Court of Appeal said that, looking at the will and codicil, which were the two instruments to be taken into consideration, there was a gift of that share to the other residuary legatees.

Now, in the present case, what Buckley J. has held is, that upon the death of a daughter without issue, her share, which is directed to fall into and become part of the residuary estate, does not go to the other residuary legatees, but that there is a

(1) [1893] 3 Ch. 369.

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division of that share into fourths, as there was in regard to the whole residue in the first instance, and that as to one-fourth of that share there is an intestacy. That is, I venture to think, entirely contrary to the decision of the Court of Appeal in *In re Palmer* (1); and, therefore, it seems to me, with all respect to Buckley J., that he has come to a wrong conclusion; and that, instead of holding that the share of a daughter dying without issue was divisible into fourths, he ought to have held it was divisible, in the case of the first daughter so dying, into thirds, in the case of the second daughter so dying into halves, and so on.

Then as to the subsidiary point, I think that the rule as to accruing shares, which is the primâ facie rule, does not apply in this case for the reasons which have been given by Vaughan Williams L.J.

COZENS-HARDY L.J. I agree. I cannot help thinking that Buckley J., in attempting to distinguish this case from *Crawshaw* v. *Crawshaw* (2), was probably successful; but in so doing he seems to me to have overlooked the fact that the minute distinctions which Sir G. Jessel discovered in *Crawshaw* v. *Crawshaw* (2) need now no longer be sought for, because the difficulty that was in the way in *Crawshaw* v. *Crawshaw* (2) and similar cases, caused by the supposed rule in *Humble* v. *Shore* (3), has now been formally and absolutely got rid of by the decision of the Court of Appeal in *In re Palmer*. (1) It seems to me, with great respect to the learned judge, that it is impossible for us to concur in the view which he has expressed; and that it is not open to us to do otherwise than follow the decision of the Court of Appeal, and hold that, under the words of this will, there is a gift of the share of any daughter, who dies without leaving issue, to the other daughters. That disposes of what I may call the main part of the appeal; and it seems to follow, as Stirling L.J. has said, that the first share must be divided into thirds, the second into halves, and so on.

The subsidiary point raised by Mr. Medd created for a

(1) [1893] 3 Ch. 369. (2) 14 Ch. D. 817. (3) 7 Hare, 247.

moment, I thought, a little more difficulty; but, on consideration, I am satisfied that there is sufficient in this will to shew that the testator was dealing with his residue as a whole, and disposing of it as a whole. That being so, no distinction should be drawn between original shares and accrued shares.

VAUGHAN WILLIAMS L.J. The appeal is allowed, and the order we now make should contain the declarations asked by the notice of appeal. The costs of all parties, as between solicitor and client, will come out of the estate.

Solicitors: *Simpson & Co.*

G. I. F. C.

In re HIGHETT AND BIRD'S CONTRACT.

[1901 H. 3891.]

Vendor and Purchaser—Leasehold House—Title—Open Contract—Repairs—Breach of Covenant to Repair—Receipt for Rent, Production of—Local Authority—Dangerous Structure—Notice to Repair—Magistrate's Order—"Outgoing," Liability for—Good Title—Specific Performance—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 4 *—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii., L. & P.*), *Part IX.*

A purchaser on July 1, 1901, entered into an open contract with a vendor for the purchase of a leasehold house, the lease of which contained a covenant by the lessee to keep in good repair. At the date of the contract the purchaser was aware that the lease contained such a covenant; he was also aware from previous inspection that the house was, as the vendor in fact admitted, in bad repair, and on that account the vendor agreed to accept a reduced price. The Court held that November 6 was the date fixing the rights and liabilities of the parties under the contract. On September 27 the vendor was served with a "dangerous structure" notice from the London County Council under the London Building Acts, 1894 and 1898, requiring him to pull down or render secure a part of the house. The notice not being complied with, a police court order was made on November 1 requiring him to do the repairs within fourteen days from service of the order, but he was not served with it till November 9. On October 24 the vendor paid the Michaelmas rent due under his lease, and he produced the receipt for it to the purchaser.

Upon a summons taken out by the vendor under the Vendor and Purchaser Act, 1874, for a declaration that he had made a good title and

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that the expenses of complying with the police court order should be borne by the purchaser:—

Held, apart from the question as to the date at which the requirements of the "dangerous structure" notice and the subsequent police court order had ripened into an obligation—as to which the Court expressed no opinion—that the purchaser had proved a breach of the vendor's covenant to repair, and that therefore s. 3, sub-s. 4, of the Conveyancing Act, 1881—which requires a purchaser of leaseholds, on production of the receipt for the last payment due for rent, to assume, "unless the contrary appear," that all the covenants of the lease have been performed—did not apply, since the contrary did appear; and that, on the authority of *Barnett* v. *Wheeler*, (1841) 7 M. & W. 364, the vendor's obligation to make a good title was not removed by the knowledge of the purchaser at the date of the contract that the title was bad by reason of the breach of covenant: and accordingly that the expense of complying with the police court order must be borne by the vendor.

But *semble*, per Romer L.J., having regard to the reduced price the vendor had, in the circumstances, agreed to accept, the case would not have been one for enforcing specific performance in an action against him.

On a sale of leaseholds, the production by the vendor of the receipt for rent last due is not, under s. 3, sub-s. 4, of the Conveyancing Act, 1881, in itself conclusive evidence of the due performance of the covenants of the lease: it is only evidence of due performance "unless the contrary appears"; and therefore, notwithstanding the production of the receipt, it is open to the purchaser to adduce evidence of non-performance as a ground for resisting specific performance.

Decision of Swinfen Eady J., [1902] 2 Ch. 214, affirmed.

APPEAL from Swinfen Eady J. (1)

In July, 1901, Alfred John Bird entered into a contract with William Highett to purchase a leasehold house, No. 142, Friern Road, East Dulwich, held for an unexpired term of about eighty years at a ground rent of 7*l.* per annum, for 365*l.* The lease contained a covenant by the lessee to keep the house in good and substantial repair and condition. The contract was an open one, contained in letters the last of which was written by the vendor on July 1, 1901. The contract fixed no date for completion, but on August 28, 1901, the parties agreed that the purchase should be completed on September 27, 1901. Before entering into the contract the purchaser, who was aware that the lease contained a covenant to repair, inspected the house, which he found was in a bad state of repair, as in fact the vendor admitted, and accordingly

(1) [1902] 2 Ch. 214.

on that ground the purchaser offered and the vendor agreed to accept the reduced price of 365*l.*

On September 21 the purchaser wrote to the vendor pointing out that he had committed a breach of covenant by allowing the house to fall into disrepair and requesting him to remedy the breach. At the same time the purchaser informed the lessor, the ground landlord, that the house was out of repair; but the lessor took no steps in the matter, whereupon the purchaser complained to the London County Council.

On the evening of September 27, 1901, the day the parties had fixed for completion, the tenant of the house brought to his landlord, the vendor, a "dangerous structure" notice, which had been left upon the premises the previous day by the London County Council under the London Building Act, 1894 (57 & 58 Vict. c. ccxiii., L. & P.), Part IX., and the London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii., L. & P.), requiring the owner or occupier forthwith to take down or underpin or otherwise render secure the front bay (which was in a cracked condition) of the house, and to shore up the whole of the house.

That notice was not complied with, and on November 1 an order was made by the Lambeth Police Court, under the London Building Acts, requiring the owner or occupier to do the work mentioned in the notice to the satisfaction of the surveyor within fourteen days from the service of the order. This order was served on the vendor on November 9, 1901. Meanwhile requisitions had been delivered by the purchaser and answered by the vendor, one requisition being for the production by the vendor of the receipt for the ground rent due at Michaelmas, 1901, which receipt was duly produced by the vendor to the purchaser, the ground rent having been paid on October 24. There had been a long correspondence between the solicitors as to the sufficiency of the answers to requisitions, but in the result the last outstanding requisition was disposed of and the answer thereto accepted on November 6, 1901, which Swinfen Eady J. held to be the date upon which the rights and liabilities of the parties were to be determined. The question having arisen who, under the circumstances, ought

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to bear the expense of complying with the order of the police court, the vendor on December 10, 1901, took out a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that he had made a good title, and that the purchaser was not entitled to require him to bear the expense of complying with the police court order.

On the hearing of the summons, Swinfen Eady J. held, as already reported, that the expense in question must be borne by the vendor.

The vendor appealed.

The appeal was heard on January 13, 1903.

Eve, K.C., and *E. Ford*, for the vendor, adduced the same arguments as in the Court below, contending that, having regard to the provisions in Part IX. of the London Building Act, 1894, the obligation to do the repairs was not an "outgoing" until the completion of the work, or, at the earliest, until the order to do it was made, and that as the order was made after the date fixing the rights and liabilities, the outgoing was one that should be discharged by the purchaser. With reference to *Barnett* v. *Wheeler* (1), cited by Swinfen Eady J. in his judgment as deciding that an obligation on a vendor of leaseholds to make a good title was not removed by the knowledge of the purchaser, at the time of the sale, that the title was bad by reason of the vendor's breach of covenant to repair, they contended that s. 3, sub-s. 4, of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) (2), was passed for the express purpose of relieving the vendor from so onerous an obligation, and that the production of the receipt in the present case must be accepted by the purchaser as evidence of the performance of all the covenants in the lease, and as an absolute

(1) 7 M. & W. 364.

(2) Sect. 3, sub-s. 4, of the Act is as follows: "Where land sold is held by lease (not including underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase."

bar to any objection on the ground of non-performance. Moreover, in *Barnett* v. *Wheeler* (1) the contract was to sell in good repair, whereas there was no such term in the present case. It would be a great hardship on the vendor who had sold the property at a reduced price on account of the want of repair to be told that after all he must put it into good repair.

Rowden, K.C., and *W. M. Spence*, for the purchaser, were not called upon.

COLLINS M.R. This is an appeal from a decision of Swinfen Eady J. upon a controversy which has arisen between a vendor and a purchaser by reason of the local authority having intervened by requiring repairs to be done to the house which is the subject-matter of the contract.

Now, the contract was an open contract—that is to say, it contained no specific provisions, and certainly no provision dealing with the point that has arisen; but after the date of the contract, and before November 6, 1901, the date at which, as found by the learned judge, the rights and liabilities of the parties under the contract became fixed, the local authority intervened under the powers of the London Building Acts, and put the statutory machinery in motion for requiring the owner or occupier of the house to take steps for preventing the building becoming dangerous to passers-by. One point which was raised before the learned judge and before us is, What are the rights of the parties in respect of the requirements of the local authority, in the absence of any definition of those rights in the contract, having regard to the terms of the London Building Act, 1894—had the obligation incurred under the Act ripened on November 6, 1901, into a contract to pay a sum of money? Now, it is contended on the part of the vendor that the expenses in question had not become an outgoing on November 6, but that the matter was inchoate and had not ripened into an obligation before that date, and that therefore the purchaser could not claim the expenses from the vendor. It is not necessary, however, for us to give any decision on that point. Swinfen Eady J. did not decide it, but based his

(1) 7 M. & W. 364.

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judgment upon another ground. The point is one of some nicety, and we are not forced to express any opinion upon it now.

But the other ground upon which Swinfen Eady J. decided the case is sufficient to dispose of this appeal. The premises were, at the date of the contract, in such a condition of disrepair as to shew that there had been, as between the vendor and his lessor, a breach of the covenant by the vendor to repair. That breach extended down to November 6, and thus there arose a right of action by the purchaser against the vendor for having failed to make a good title, inasmuch as the premises were in a condition involving the intervention of the local authority. That right of action was based upon the authority of *Barnett* v. *Wheeler* (1), which was relied upon by Swinfen Eady J., and which dealt with the rights of a purchaser of leaseholds where the vendor had, through breach of covenant, failed to make a good title.

That being the state of things when the time arrived for completion, it is now said by the appellant that the law in *Barnett* v. *Wheeler* (1) is not applicable to the present case because, he says, it has been changed by the Conveyancing Act, 1881. What was the law laid down in that case? It appears that there was a contract for the purchase of leaseholds, and it turned out that there had been a breach of a covenant to repair on the part of the vendor, so that the Court decided that he had not made a good title, although the purchaser was, at the time of the sale, himself aware of the condition of the premises. That was the law as laid down in that case. Now, has it since been altered by the Conveyancing Act, 1881? It is suggested that the whole of that law is now altered by s. 3, sub-s. 4, of the Conveyancing Act, which is as follows: [His Lordship read the sub-section, and continued:—]

How far does that enactment modify the law laid down in *Barnett* v. *Wheeler*? (1) Assuming that the purchaser is aware of the vendor's breach of covenant, how far does the Act affect the law so laid down and deprive the purchaser of his right of

(1) 7 M. & W. 364.

action? It appears to me that the modification goes only to this extent—that the burden of proving the existing breach is now thrown upon the purchaser, and that production to him of the receipt for the last payment of rent is now primâ facie evidence of compliance with the covenants in the lease up to the date of actual completion, and that is all. Upon production of that receipt the purchaser must assume that the covenants have been duly performed "unless the contrary appears." Well, suppose the contrary does appear: can it be contended that the sub-section debars the purchaser from going into evidence to prove the contrary? In my opinion, it does not; and, if the purchaser does prove the contrary, it appears to me that he brings himself exactly within the position of the purchaser in *Barnett* v. *Wheeler*. (1)

It was argued most strenuously that the production of the receipt is not only primâ facie evidence, but conclusive evidence of the due performance of the covenants by the vendor. I do not assent to that argument. The enactment seems to me to leave the law where it stood, except so far as it modifies the incidence of the burden of proof.

In my opinion, the judgment of Swinfen Eady J. is exhaustive of the case, and I should not have added anything to it, had it not been that, having heard the case elaborately argued, I thought it only respectful to counsel to give my own reasons for arriving at the same conclusion as the learned judge.

ROMER L.J. I am of the same opinion. I have nothing to add to what the Master of the Rolls has said and to what Swinfen Eady J. said in the Court below, except that I should like to point out that this is not a case of specific performance. Had it been an action by the purchaser for specific performance, it might well be that he could not compel specific performance, the case being one in which both the vendor and the purchaser must have contracted for the sale and purchase at the reduced price agreed upon on the very footing that the property was in a bad state of repair. This is not a case of specific performance; and it does not follow that, if it had

(1) 7 M. & W. 364.

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been, the Court would have enforced a contract which involved very great hardship on the vendor.

COZENS-HARDY L.J. I am of the same opinion. I entirely agree, not only with the conclusions, but also with the reasoning of Swinfen Eady J.; and I only wish to add a very few words of my own.

We have really been asked to construe sub-s. 4 of s. 3 of the Conveyancing Act—which is a very useful enactment—in the sense that on a sale of leaseholds, upon production of the last receipt for rent, the purchaser shall assume that all the covenants in the lease have been performed, not "unless," but "although" the contrary appears. That seems to me to be an impossible construction.

Like the Master of the Rolls, I desire to express no opinion either way upon the other point—whether the expenses under the London Building Acts are outgoings payable by the purchaser or chargeable upon the premises.

Solicitors: *John Bartlett; J. E. Anthony.*

G. I. F. C.

BOOTH *v.* NEW AFRIKANDER GOLD MINING COMPANY, LIMITED.

C. A. 1902 Nov. 19, 20.

[1902 B. 4195.]

Company—Reconstruction—Sale of Undertaking—Consideration—Shares in New Company—Partly paid-up Shares, Payment in—Commission, Applying Capital for—Underwriting—Memorandum and Articles of Association—Construction—Offer of Shares for Public Subscription—Ultra Vires—Injunction—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 8, *sub-ss.* 1, 2.

A limited company formed in 1898, having by its memorandum power to sell its undertaking either for cash or for "shares in any company," entered into an agreement, with a view to reconstruction, with certain "guarantors" for the sale to them of its undertaking, the purchasers agreeing to form a new company for the repurchase of the undertaking in consideration of the allotment and issue, to such members of the old company as should accept the same, of partly paid-up shares in the new company, with power for the liquidator of the old company, on its being wound up, to sell any shares not accepted by its members.

To carry out that agreement a new company was formed in 1902, with power, by its memorandum, to pay out of its funds all expenses it might incur having regard to s. 8 of the Companies Act, 1900, including commission for underwriting shares; and clause 9 of its articles provided that if at any time it should offer its shares to the public for subscription the directors might pay a commission at a "rate" not exceeding 50 per cent. to any person in consideration of subscribing or agreeing to subscribe for shares.

An agreement was then entered into between the guarantors (the original purchasers) and the 1902 company for the "sale" to that company of the undertaking of the 1898 company in consideration of the 1902 company allotting and issuing to the guarantors its shares, partly paid up, for distribution among the members of the 1898 company, the guarantors agreeing that they by themselves or their nominees would accept an allotment of such of the shares as should not be required by the 1898 company or its liquidator; and, as the balance of the consideration for the sale, the 1902 company agreed to pay the guarantors "12,300*l.* in cash." Soon after the date of that agreement the 1898 company passed resolutions for a voluntary winding-up. No prospectus of the 1902 company had yet been issued offering any of its shares to the public for subscription.

In an action to restrain the carrying out of the latter agreement as being ultra vires:—

Held, that the sale of the undertaking of the 1898 company, so far as it was in consideration of partly paid-up shares in the 1902 company, was authorized by the memorandum of the former company; but

Held, that the additional consideration of the payment by the 1902

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company of 12,300*l.* in cash was ultra vires on the grounds (1.) that it was prohibited by sub-s. 2 of s. 8 of the Companies Act, 1900, as being "commission in consideration of subscribing or agreeing to subscribe for shares"; (2.) that there had been no such "offer of shares to the public for subscription" as to bring the 1902 company within the protection of sub-s. 1; and (3.) that the sum of cash was not a "rate" within clause 9 of that company's articles.

An injunction was therefore granted restraining the 1902 company from applying its capital in payment of the 12,300*l.*, but without prejudice to any question as to whether the company could by any means bring the payment within sub-s. 1.

Whether, in the event of a company offering some of its shares to the public for subscription, and procuring a person or persons to take up the rest in consideration of a commission, that would be a transaction validated by sub-s. 1 of s. 8 of the Companies Act, 1900, *quære.*

THE New Afrikander Gold Mining Company, Limited (hereinafter called "the 1898 company"), was incorporated in 1898 under the Companies Acts with a nominal capital of 250,000*l.* in 250,000 shares of 1*l.* each. Its objects, as stated in the memorandum of association (to which there were seven signatories for one share each), included, amongst a large variety of others, the acquiring and working the undertaking of the Afrikander Gold Mining Company, Limited, of 1897; to lend money to any company or persons with or without security, and generally upon such terms as the company might deem expedient; "to accept payment for any property or rights sold, or otherwise disposed of, or dealt with, by the company, either in cash, by instalments or otherwise, or in shares of any company, with or without deferred or preferred rights in respect of dividends, or repayments of capital, or otherwise, or by means of a mortgage or by debentures, debenture stock, mortgage debentures or other securities of any company, or partly in one mode and partly in another or others, and generally on such terms as the board may approve"; also "to sell, exchange, let on rent, royalty, share of profits, or otherwise, grant licences, easements, and other rights of and over and in any other manner deal with or dispose of all or any part of the undertaking, and all or any part of the property for the time being of the company"; and further, to amalgamate with any other company whose objects were similar, "whether by purchase or sale of the undertaking."

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The property of the company consisted chiefly of considerable mining claims in the Klerksdorp district of the Transvaal; but, in consequence of the Boer war, all mining work upon the property had to be stopped. At the close of the war in May, 1902, it was proposed to resume mining operations; but for this purpose further working capital was required, to raise which a reconstruction scheme was proposed to be carried out through the medium of the Associated Guarantors, Limited, a company incorporated on June 20, 1902, with a nominal capital of 1000*l.* only in 1000 shares of 1*l.* each. The scheme eventually took the form of a sale by the 1898 company of its undertaking and assets to the Associated Guarantors, Limited, under an agreement between those two companies dated July 11, 1902, to be followed by a resale by the Associated Guarantors, Limited, to a new company to be incorporated under the name of "The Afrikander Gold Mining Company (1902), Limited."

The agreement of July 11, 1902, was entered into between the 1898 company (thereinafter called "the vendor company") of the one part, and the Associated Guarantors, Limited (thereinafter called "the purchasers") of the other part. After reciting that 205,014 of the 250,000 shares of the vendor company had been issued with 19*s.* 6*d.* per share paid up, with the exception of seven shares in respect of which the holders were still liable to pay 1*l.* per share: that by resolution of the board of the vendor company dated July 4, 1902, the remaining 6*d.* per share in respect of 205,007 shares had been called up, such call being due on July 30, 1902: and that it was proposed that the purchasers should form a company (thereinafter called "the new company") under the Companies Acts, 1862 to 1900, with the same or a similar name to that of the vendor company, and with a nominal capital of 250,000*l.* in 250,000 shares of 1*l.* each, and having for its objects (inter alia) the acquisition of the property and undertaking of the vendor company: It was agreed (1.) that the vendor company should sell and the purchasers should purchase the entire undertaking and property of the vendor company; (2.) that the purchasers should within three months from the date of the agreement form and incorporate the new company as aforesaid, and procure that company

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to enter into an agreement with the purchasers for the resale and repurchase of the premises now agreed to be sold in the form scheduled to the present agreement; (3.) that as part of the consideration for the sale now agreed to be made, the purchasers should procure the new company to allot and issue to the vendor company or its nominees such a number of shares of 1*l.* each of the new company credited with 12*s.* per share as paid up, but not exceeding in the whole 205,014 shares, as the vendor company should, on or before the day appointed for completion, require by notice in writing to the purchasers to be allotted to the vendor company or its nominees; (4.) that, as further part of the consideration, the purchasers should undertake to discharge all the liabilities of the vendor company and fulfil all contracts binding on that company, and indemnify that company against such liabilities and contracts; (5.) that, as further part of the consideration, if the vendor company should go into liquidation before the completion of the sale, the purchasers should pay and indemnify the vendor company and its liquidator against the costs of the winding-up of the vendor company and of carrying out the sale; provided that if the purchasers should procure the new company when incorporated to enter into an agreement with them to adopt the purchasers' liabilities under clauses 4 and 5, and should either assign the benefit of such agreement to the vendor company, or procure the new company to enter into a like agreement direct with the vendor company, the purchasers should thereupon be discharged from all further liability under clauses 4 and 5; (8.) if the vendor company should go into liquidation before the completion of the sale, its liquidator should offer the shares to be allotted and issued under this agreement to its members according to their respective rights and as representing their shares or interests in its assets, in the proportion of one share of the new company, with 12*s.* credited as paid up thereon, for each share fully paid in the vendor company, naming a date within which such offer should be accepted; that the right to the allotment of any shares not so accepted might be sold by the said liquidator, and that the purchasers should procure any of the said shares so accepted by members of the vendor company, or the right of an allotment

of which should have been so sold by the liquidator, to be duly allotted and issued to them as the nominees of the purchasers, a list of whom, with a proper nomination form, signed by the liquidator, should be delivered to the purchasers within a certain time; and that, as regarded any of the said 205,014 shares of the new company in respect of which no such nomination should have been received by the purchasers, they (the purchasers) "shall by themselves or their responsible nominees take up and subscribe for and accept an allotment of the same, so that not less than 205,014 shares of the new company may be subscribed for upon the terms of the subscribers assuming the liability of 8*s.* per share thereon," such liability to be payable by instalments as therein mentioned.

The draft scheduled agreement was, in form, made between the Associated Guarantors, Limited (thereinafter called "the vendors"), of the one part, and an intended company to be called "The Afrikander Gold Mining Company (1902), Limited" (thereinafter called "the purchasing company"), of the other part. It was an agreement for the "sale" by the vendors and the "purchase" by the purchasing company of the undertaking and property of the 1898 company, and stipulated that as part of the consideration the purchasing company should allot and issue to the vendors or their responsible nominees 205,014 shares of 1*l.* each of the purchasing company, credited with 12*s.* paid per share: with a proviso that the purchasing company should be bound to accept as nominees of the vendors such persons, being members of the 1898 company or purchasers of the rights of such members, as should be nominated by that company or its liquidator pursuant to the terms of the original agreement, and to allot to such nominees their respective proportions of the said 205,014 shares; and a further proviso that the vendors should be bound to accept an allotment by themselves or their responsible nominees as aforesaid of such number of the said 205,014 shares, credited with 12*s.* paid per share, as should not be required by the 1898 company or its liquidator; the unpaid liability of 8*s.* per share to be payable in the manner therein set forth. And as further part of the consideration the purchasing company was to undertake to

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discharge the liabilities of the 1898 company, and, in the event of that company going into liquidation before the completion of the sale, the purchasing company was to pay and indemnify the vendors, and the 1898 company and its liquidator, against the costs of the winding-up, of carrying out the sale, and of the registration of the purchasing company. Then followed this additional consideration: "(5.) As the balance of the consideration for the said sale and purchase, the purchasing company shall pay to the vendors the sum of 12,300*l.* in cash." Then it was agreed (6.) that the sale should be completed in London on December 31, 1902, or on such earlier date as the vendors should execute in favour of the purchasing company a power of attorney for the purposes therein mentioned, whereupon the said 205,014 shares should be allotted and issued as aforesaid; and that the said 12,300*l.* should be paid within fourteen days after the date appointed for payment of the allotment moneys in respect of the said shares; (9.) that until complete satisfaction by the purchasing company of the whole of the said consideration, the vendors should have a lien upon the premises agreed to be transferred for the unpaid or unsatisfied balance of such consideration; and (10.) that the purchasing company should procure this agreement to be registered so as to comply with the provisions of the Companies Act, 1900, in reference to the said share-purchase consideration.

On July 14, 1902, a notice was issued calling an extraordinary general meeting of the members of the 1898 company for the purpose of passing a resolution approving the agreement of July 11, 1902, and therewith was issued a circular of the same date, the 14th, signed by the secretary, informing the shareholders of the financial position of the company, and of the proposal for a sale of the undertaking to the Associated Guarantors, Limited, "with a view to the resale to a new company": also that any effective scheme must cover the provision of working capital to the amount of 65,000*l.* It then gave a précis of the agreement with the Associated Guarantors, and of the proposed agreement for resale to the intended new company, including the provision for payment

of 12,300*l.* in cash. The circular concluded by inviting the shareholders' support to the proposals as affording the only means of furthering their interests.

On July 24, 1902, the extraordinary general meeting of the 1898 company was duly held, when the shareholders passed a resolution approving the agreement of July 11, 1902, and authorizing the directors to carry it into effect. The plaintiff, who was the holder of 1000 fully paid 1*l.* shares in the 1898 company, dissented from that resolution.

On August 23, 1902, the intended new company was duly incorporated under the name of "The Afrikander Gold Mining Company (1902), Limited" (hereinafter referred to as "the 1902 company"). Its objects, as stated in its memorandum (to which there were seven subscribers for 1*l.* each), were, amongst numerous others, to enter into and carry into effect an agreement in the form of the draft scheduled to the agreement of July 11, 1902, and "(*u*) To pay out of the funds of the company all or any expenses which the company might lawfully pay, having regard to the provisions of s. 8 of the Companies Act, 1900, of and incident to the promotion, formation, organization, registration, advertising and establishment of this or any other company, and to the issue and subscription of the share or loan capital, including brokerage and commissions for obtaining applications for, or placing or guaranteeing the placing of, the shares or any debentures, debenture stock, or other securities of this or any other company. . . ."; "(*y*) To pay out of the funds of the company all expenses which the company may lawfully pay, having regard to the provisions of s. 8 of the Companies Act, 1900, of or incident to the formation, registration of, and advertising or raising money for, the company, and the issue of its capital, including brokerage and commission for obtaining applications for or taking, placing or underwriting shares, debentures or debenture stock, and to apply at the cost of the company to Parliament for any extension of the company's powers." The capital of the company was 250,000*l.* in 250,000 shares of 1*l.* each.

Clause 9 of the articles of association was as follows: "If

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the company at any time shall offer any of its shares to the public for subscription, the directors may pay a commission at a rate not exceeding 50 per cent. to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company."

On September 11, 1902, an agreement was entered into between the Associated Guarantors, Limited, and the 1902 company in the form of the draft scheduled to the agreement of July 11, 1902.

On September 30, 1902, and October 21, 1902, the 1898 company passed resolutions for a voluntary winding-up, and a liquidator was appointed.

In October, 1902, with a view to meeting the requirements of the Companies Act, 1900 (63 & 64 Vict. c. 48), a circular was prepared by the firm of solicitors acting for the liquidator of the 1898 company and for the 1902 company; but in consequence of the institution of the present action it was not finally settled for circulation, nor was it in fact further proceeded with; a proof print of it was, however, produced in evidence in order to shew what were the intentions of the parties at the time. It was dated "—— October, 1902," and addressed by the liquidator of the 1898 company to its shareholders. It stated that in accordance with the resolution of July 24, 1902, and the agreement of July 11, 1902, the 1902 company had been registered and had entered into the necessary agreement for the purchase of the properties of the 1898 company: then it stated the resolutions for winding-up the 1898 company and enabling the liquidator to distribute the shares of the 1902 company under the scheme of the agreement of July 11, 1902. Then it went on to invite applications for shares in the 1902 company as provided for by the scheme; and, with regard to any shares that might be unapplied for, the liquidator added, "I reserve the right to offer such shares for public subscription." Annexed to the circular was a prospectus of the 1902 company containing, in addition to the information usual in a prospectus, the par-

ticulars specially required to be inserted in a prospectus by s. 10 of the Companies Act, 1900; and it was accompanied by forms of applications for shares. No offer had yet been made by the 1902 company, or by the 1898 company or its liquidator, in any form, whether by advertisement, prospectus or otherwise, offering any of the shares of the 1902 company to the public for subscription.

On October 23, 1902, the plaintiff, suing on behalf of himself and all other the shareholders of the 1898 company, issued the writ in this action against that company, its liquidator, and the Associated Guarantors, Limited, claiming a declaration that the agreement of July 11, 1902, was ultra vires and illegal as being obnoxious to the provisions of the Companies Act, 1900; also an injunction to restrain the defendants from acting on or carrying into effect that agreement; and, in the alternative, a declaration that the plaintiff and all other dissentient shareholders of the defendants, the 1898 company, were entitled to the rights conferred by s. 161 of the Companies Act, 1862, and an injunction to restrain all the defendants from dealing with the assets of the 1898 company without making proper provision for payment of the claims of dissentient shareholders.

On November 7, 1902, Swinfen Eady J. granted an interim injunction restraining the defendants, the 1898 company and its liquidator, from acting on or carrying into effect the agreement of July 11, 1902, his Lordship holding that the agreement for payment to the Associated Guarantors, Limited, of 12,300*l.* out of the subscribed capital of the 1902 company was clearly obnoxious to s. 8, sub-s. 2, of the Companies Act, 1900 (63 & 64 Vict. c. 48) (1); also that offering the shares thereafter on some

(1) Sect. 8 enacts as follows:—

"(1.) Upon any offer of shares to the public for subscription, it shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission and the amount or rate per cent. of the commission paid or agreed to be paid are respectively authorised by the articles of association and disclosed in the prospectus, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised.

"(2.) Save as aforesaid no company shall apply any of its shares or capital

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fresh agreement or some fresh transaction between the Associated Guarantors, Limited, and the 1902 company would not validate what was at present an invalid and illegal document. It was, said his Lordship, an illegal stipulation forming an essential term of the contract to which the 1898 company was a party. He therefore thought, on that ground alone, there was, at all events, such a case to be tried that he must grant an injunction restraining the defendants, the 1898 company and its liquidator, until the trial, from carrying out the agreement.

The defendants appealed.

The appeal was heard on November 19 and 20, 1902.

In the course of the argument on the appeal it was agreed, and leave was given, that, in order to obtain a decision upon the real question at issue—namely, whether, as a matter of law, having regard to s. 8 of the Companies Act, 1900, the 12,300*l.* could be paid to the Associated Guarantors, Limited, by the 1902 company out of its capital—one of the signatories to the memorandum of association of the 1902 company should, with his consent in writing, be added as a plaintiff suing on behalf of himself and all other the shareholders in that company; that the 1902 company should be added as a defendant; that the writ and statement of claim should be treated as amended accordingly; and that the motion for injunction in the Court below should be treated as the trial of the action, and the appeal as an appeal from the judgment at the trial.

Haldane, K.C., and *Sargant*, for the defendants, the 1898 company and its liquidator, and also for the 1902 company

money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

"(3.) But nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay."

agreed to be added as a defendant. First, this is a general transaction of sale and resale, and not one entered into in consideration of any subscriptions or agreements to subscribe. No doubt the resale is at an enhanced price, but the profit on a resale, whether the transaction takes the form of payment in cash or in shares, is not a transaction in any way touched by s. 8, sub-s. 2, of the Companies Act, 1900. This is not an arrangement for payment of commission at all; it is a bonâ fide open transaction—a transaction in which every single shareholder in the 1898 company has equal opportunities. There is nothing in the transaction which is concealed, or which gives any one of the shareholders in that company an undue preference over another. It is simply an agreement by the 1898 company for a sale to the Associated Guarantors, Limited, upon the terms that the latter shall resell to another company. Sub-s. 2 does not prohibit every case of addition to the purchase price, but only when the addition is made by way of commission. It is intended to hit such a case as *Lydney and Wigpool Iron Ore Co.* v. *Bird* (1), where the commission was loaded on to the price. Where the Court sees that a commission is to be paid to some one for underwriting shares, and that such commission is wrapped up in the purchase price, then no doubt the sub-section applies; but the Court must find upon the evidence that there is in fact a "commission, discount, or allowance" for underwriting.

Secondly, even assuming that the transaction does fall within the prohibition in sub-s. 2 as being one of "commission," then we are protected by sub-s. 1, for the payment of commission is expressly authorized by the memorandum and articles of the 1902 company. True, the sub-section requires that it shall also be disclosed in the prospectus: that has not been done for the reason that no prospectus of the 1902 company has yet been issued; but we undertake, on behalf of that company, that the agreement shall not operate until the issue of the prospectus.

[COZENS-HARDY L.J. But the undertaking you offer is an entirely new agreement. I do not see how you can amend the

(1) (1886) 33 Ch. D. 85.

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existing agreement. The "prospectus" mentioned in sub-s. 1 is the prospectus offering shares "to the public for subscription," and the sub-section contemplates the prospectus, which is the offer to the public, disclosing any antecedent payment, or agreement for payment, of commission.]

If, after the agreement to pay commission, a prospectus is issued setting out the facts, that, coupled with the authority given by the memorandum and articles, is a compliance with sub-s. 1. In order that an agreement to pay commission may be stated in the prospectus, the agreement must already exist; and it is submitted that, until the event happens that the prospectus is issued without a statement of the agreement, the prohibition in sub-s. 2 does not apply. There is nothing to shew that the transaction is not within that sub-section, for there is no evidence that the parties to the agreement contemplated anything illegal. Sect. 8 is both enabling and prohibitive: that is to say, commission may be paid, provided the requirements of sub-s. 1 are complied with. The section does not prevent remuneration being paid out of a company's capital for services rendered in placing or procuring subscriptions: *Hilder* v. *Dexter* (1), where sub-s. 2 is explained.

[VAUGHAN WILLIAMS L.J. Does not sub-s. 1 apply to commissions on placing or taking shares that are offered to "the public"? Here the shares of the 1902 company are being offered, not to "the public," but to the shareholders of the 1898 company.]

So long as there is "any" offer of shares to the public, no matter how small the offer may be, that is sufficient to satisfy sub-s. 1; for publicity, which is the object of the sub-section, is thereby assured, and there is no reason for confining the payment of commission to the case of shares actually offered for public subscription. But the question really is, What does the expression "the public" mean? We submit that it does not necessarily mean the general public, in the ordinary and larger sense. Looking at the definition of "prospectus" in the interpretation section, s. 30, the expression "the public" may be taken to denote the limited class of persons—a section

(1) [1902] A. C. 474, 479, 480.

of the public—who are likely to take shares in a company, and may include shareholders in an existing company. If it were held that an invitation to persons who are shareholders in one company to take shares in another company is not an invitation to "the public," the result would be to deprive the shareholders intending to take those shares of the advantages of s. 10, which requires that "every prospectus" shall state a number of certain specified particulars. Sects. 10 and 30 really explain the meaning of sub-s. 1 of s. 8. A section of the public is quite enough to satisfy the words of that subsection: that is to say, it is not necessary to advertise to the whole world what you are going to do. The result is, as we submit, that commission may be paid provided the persons invited to subscribe for shares are told what commission is being paid.

Then, thirdly, it is said that the transaction is ultra vires, since part of the consideration for the purchase by the 1902 company was to be shares partly paid up only in that company. But that is, it is submitted, covered and authorized by the memorandum of association of the 1898 company. And it is further said that the transaction is contrary to the proviso in s. 161 of the Companies Act, 1862 (25 & 26 Vict. c. 89), under which, where one company proposes to wind up and to transfer its undertaking to another company in consideration of shares or other interests in the latter company, any dissentient shareholder in the former company is entitled to have his shares realized and valued. But it has already been decided in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1) that s. 161 does not prohibit a company, where authorized so to do by its memorandum of association, as is the case here, to sell its assets for shares in another company, and to divide in specie among the shareholders the shares so acquired. If the decision of Swinfen Eady J. is right, it will be impossible for a company to sell its undertaking partly for cash and partly for shares.

Hon. E. C. Macnaghten, K.C., and *Sargant*, for the defendants, the Associated Guarantors, Limited, said that if the

(1) [1892] 3 Ch. 454.

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agreement was valid those defendants were prepared to carry it out.

Eve, *K.C.*, and *Beddall*, for the plaintiff, and also for the signatory of the memorandum of association of the 1902 company, who was agreed to be added as co-plaintiff on behalf of himself and all other shareholders of that company. It is manifest from the agreement itself that the 12,300*l.* is commission within the prohibition in sub-s. 2 of s. 8, and does not come within sub-s. 1. Also, under the memorandum and articles of the 1898 company, the whole transaction is ultra vires. *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1) was a different case. There the sale was by the old company to the new in consideration of shares only in the new, under the power contained in the memorandum of the old company to sell their undertaking in consideration of "shares" in any other company; the sale was not, as it is here, in consideration of cash as well as shares.

With regard to the construction to be put upon s. 8, the intention of the Legislature was that the discount or commission which was to be allowed should be upon the shares offered to "the public" in the usual way, and upon no other shares whatever; and that is the true meaning of sub-s. 1. It never could have been intended that, by issuing, say, seven shares out of 1000 to the public, you could pay a commission on all but the seven shares to persons who had subscribed privately and who had taken them, it might be, at 99 per cent. discount. The reasonable construction is that the commission payable must be commission upon the shares offered to the public.

[VAUGHAN WILLIAMS L.J. I should have thought that the words of sub-s. 1 were primâ facie wide enough to include the case you put—that if seven shares only are offered to the public, then a commission may be paid in respect of the whole balance of shares. Sub-s. 1 does not say that the commission must of necessity be in consideration of the person subscribing for the shares offered to the public.]

It is only upon the actual offer of shares to the public that the commission can be paid. The sub-section does not mean

(1) [1892] 3 Ch. 454.

that it can be paid upon any contemplated offer; it must be paid as part of the offer itself—that is to say, as part of that transaction.

[STIRLING L.J. Suppose it was contemplated to deal with the whole of the shares of the company, and that was done by offering half of them to the public, and then, simultaneously and as part of the same transaction, procuring an individual, in consideration of a commission, to take the rest: why should not that be within the sub-section ?]

We submit it would not, because that would be issuing shares at a discount, not paying for underwriting, which is undoubtedly what is being dealt with, or intended to be dealt with, by this sub-section. What, as we submit, is intended to be validated by this sub-section is payment of commission, provided the latter part of the sub-section is complied with; here it has not been, or attempted to be, complied with, and it cannot in fact be complied with as the circumstances now stand. If that is complied with, then commission may be paid for, in effect, guaranteeing the subscription or underwriting on the offer to the public, the governing words of the sub-section being, "Upon any offer of shares to the public."

Again, this payment is not covered by clause 9 of the articles of association of the 1902 company, for the events have not happened on which alone commission can be paid. First, none of the company's shares have been "offered to the public for subscription"; and, secondly, the directors have not fixed the rate of commission for subscribing or agreeing to subscribe for shares.

Sargant, in reply. The memorandum of the 1898 company is wide enough in its terms to empower the company to sell its undertaking either for cash or shares, or both. Even assuming that the 1902 company has in fact arranged with persons to place with them, on a commission, all its shares except seven, and those seven are offered to the public, that would be a sufficient compliance with sub-s. 1, for the public would then be made aware of the commission, which is all the section requires. As to the effect of s. 161 of the Companies Act, 1862, it is no objection to a reconstruction scheme that

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the liquidator of the old company may fix a time within which members of that company must exercise their option of taking shares in the new company: *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (1) The effect of continuing the injunction in the present case will be that under no circumstances can a company comply with sub-s. 1 before it offers its shares to the public. That cannot be the intention of the Act.

VAUGHAN WILLIAMS L.J. I propose first of all to state shortly what the nature of this case is. The 1898 company wanted 65,000*l.* more capital, and, as it did not see its way to obtaining that capital, it was proposed that a new company should be formed, and that the shareholders in the old company should be invited to take shares in the new company with a liability of 8*s.* per share, 12*s.* being paid. Then it was suggested, and very properly suggested, that shareholders in such a case do not like to come into an undertaking of that sort unless they are sure that the whole of the shares thus offered are, somehow or other, going to be taken up. It would obviously be a rash thing for a shareholder in the old company to come in and take his proportion of shares in the new company, if it were likely that a great number of shares would not only not be taken by his co-shareholders in the old company, but also not by anybody else; and, under those circumstances, it was proposed here to take care that the taking-up of the shares in the new company—205,014 shares—should be made a certainty; and the most natural way of making such a certainty was by endeavouring to get persons of position and solvency to come in and guarantee the taking-up of the whole block of these shares. Of course persons will not do that without being paid a commission for the risks that they are undertaking; and very often the risk is of such a nature that ordinary brokerage will not at all meet the case.

Now, it has by the 8th section of the Act of 1900 become lawful, on the conditions therein mentioned, to pay such a commission; and the question we have to determine here is

(1) (1889) 43 Ch. D. 452.

whether the particular cash payment in this case is a payment which comes within the 2nd sub-section of s. 8 as a "commission, discount, or allowance"; and then, assuming that we so hold, we have to go on to consider whether this payment comes within the saving clause, sub-s. 1.

As the action was originally brought, it was an action by a Mr. Booth, a shareholder in the 1898 company, and he claimed an injunction which, very probably, through the absence of the new company, he was not entitled to have; but, since all parties are anxious to obtain a decision on this section, a shareholder in the 1902 company, whose assent it has been undertaken shall be given in writing, has been added as a plaintiff, and the 1902 company has been added as a defendant; and the claim is to be treated as if it included, amongst other things, a claim by the plaintiff, the member of the 1902 company, on behalf of himself and the other members of that company, against the company or its officers, to restrain them from paying out the 12,300*l.* which is the subject-matter of this discussion.

The first question to be determined is whether this particular payment comes within the prohibition in sub-s. 2. Now, I have no doubt whatever myself but that it does. This sum of 12,300*l.* is being paid by the 1902 company, and it is being paid by that company, out of the capital which is raised on its formation, by way of commission to the intermediaries, the Associated Guarantors, in consideration of their undertaking to take up so many of the block of shares allotted to the liquidator of the 1898 company as the members of that company decline to accept in specie. Whatever the number of shares may be which are so rejected, the Associated Guarantors undertake to take those shares, and this 12,300*l.* is to be paid to them in consideration for so doing; and the question is whether or not that payment comes within the prohibition in sub-s. 2 of s. 8. I have already said I think it does. I think it only requires the facts to be thus far stated to shew clearly that it is a payment by the 1902 company of a "commission . . . . to persons in consideration of their subscribing or agreeing to subscribe for shares."

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The substantial ground upon which it is suggested that this payment does not come within sub-s. 2 is that the Associated Guarantors to whom the money is paid are really the purchasers, and that the sum of money which they are to receive is not commission, but is their profit upon a resale to the 1902 company. I think, looking at the facts of this case, it is impossible not to see that this is not a profit upon resale, but that there is, in substance, no resale at all. The Associated Guarantors, the intermediaries, never had any right or power to distribute the assets in any way but by assigning them—that is, the subject-matter of the purchase—to the new company that was to be formed; and, looking at the difference of the considerations between the so-called intermediate sale and purchase and the sale to and purchase by the 1902 company, one cannot doubt that the 12,300*l.* was commission—a commission for underwriting—and I think, therefore, this payment clearly falls within sub-s. 2.

Then it is said that the transaction is saved by sub-s. 1. The sub-section is as follows: [His Lordship read it, and continued:—] Now, taking that sub-section line by line, in my judgment there has never been in this case "any offer of shares to the public for subscription." I do not think that the shares which were agreed to be allotted by the 1902 company to the liquidator of the 1898 company for distribution amongst its shareholders were in any sense offered to the public. I agree that the payment was a payment of a commission to persons agreeing to take up these shares, but that is not justified in every case. It is only authorized in a case where the payment of the commission, and the amount or rate per cent. of the commission paid, or agreed to be paid, are respectively authorized by the articles of association, and disclosed in the prospectus. Now, I am of opinion that the payment of this 12,300*l.* is not authorized by the articles of association of the 1902 company. The article said to authorize this is the 9th, which is as follows: [His Lordship read it, and continued:—]

In my judgment the point is not a good one. First, I doubt very much whether there has been an offer to the public within the meaning of this article; but even assuming that there has

been, it is only authorized by the article when the commission takes the form of a rate not exceeding 50 per cent. In my judgment, clause 5 of the scheduled form of agreement which, it appears, has now been executed by the 1902 company, does not come within the terms of that article. Clause 5 runs thus: "As the balance of the consideration for the said sale"—that is, the sale by the intermediaries to the then intended new company—"and purchase, the purchasing company shall pay to the vendors the sum of 12,300*l.* in cash." That amount of 12,300*l.* in cash is, in my opinion, exactly what is contemplated by the words of sub-s. 1 of s. 8, and the amount and the rate may either or both of them be authorized by the articles; but it is only in so far as the articles authorize and determine the form in which the commission may be paid that advantage can be taken of sub-s. 1. In my judgment this amount of 12,300*l.* mentioned in clause 5 of the scheduled contract does not fall within the word "rate" as it is employed in art. 9 of the articles of association.

With regard to the two points that were made upon the question whether the whole agreement, having regard to the memorandum of association of the 1898 company, was or was not ultra vires. Speaking for myself, so far as the provisions contained in the memorandum and articles are concerned, I am inclined to think that the sale of the undertaking, and the payment for it in partly paid shares, does fall within the memorandum; but, in the view that I have taken of this case, it is not necessary for me to decide that question, and I do not propose to do so. In my opinion all that we have to decide is, first, Does this payment of 12,300*l.* fall within sub-s. 2? In my judgment, it does; therefore it is prohibited unless it is saved by sub-s. 1. Then, secondly, is it saved by sub-s. 1? In my judgment, it is not, for the reasons I have already stated. I think, therefore, that an injunction must now be granted, the exact terms of which can be settled presently.

STIRLING L.J. I have come to the same conclusion. There are really two points which have been seriously argued and arise in this case. The first is whether the sum of 12,300*l.*,

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which is mentioned in what I may call the scheduled agreement, is, within sub-s. 2 of s. 8 of the Companies Act, 1900, a payment of "capital money" by way of "commission, discount, or allowance, to any person in consideration of his subscribing, or agreeing to subscribe" for shares of the company. That question is in this case, and must be in every similar case, a question of fact; and I do not, in arriving at my present conclusion, in any way affirm the proposition which was put forward in the course of the argument, that if the decision of the learned judge in the Court below be upheld, it will be impossible to make a sale of property partly in consideration of shares, and partly in consideration of cash. The question, in each case, whether the cash is or is not in the nature of a commission must, in my judgment, be a question of fact; and in the present case, on reading the agreement between the 1898 company and the Associated Guarantors, and the scheduled form of agreement annexed thereto, which has now become an actual agreement, by the light of the circular of July 14, 1902, which is in evidence, I come to the conclusion that, as a matter of fact, the payment of the 12,300*l.* is a "commission" within the terms of sub-s. 2 of s. 8.

Now, that being so, it follows that the 1902 company cannot pay any portion of that sum unless they bring themselves within the provisions of sub-s. 1 of the same section. That sub-section only applies upon an offer of shares to the public for subscription, which means here, as it appears to me, an offer by the 1902 company of shares to the public for subscription. I think that is the meaning of the section; but in any case, if that were doubtful, one of the conditions for the validity of the payment is that the payment of the commission, and the amount or rate per cent. of the commission paid, or agreed to be paid, are authorized by the articles of association. Now, clause 9 of the articles of association of the 1902 company, as has already been pointed out, only authorizes the payment "if the company at any time shall offer any of its shares to the public for subscription." The offer, therefore, either by the terms of the statute itself, or by the terms of this article, must be an offer by the 1902 company. At the present moment no

offer has been made of any kind; but there has been put in evidence a proof print of a circular proposing to reserve the right to make an offer of shares to the public, but which offer has not yet been actually made. I assume that what is contemplated by the 1902 company is that an offer shall be made on the terms of that document. If, then, the Court is asked whether that is such an offer as is contemplated by the articles of association of the 1902 company, my opinion is that it is not; for, plainly, upon the terms of that document, the offer is not made by that company, but by the liquidator of the 1898 company in his right as liquidator, and as dealing with the assets of that company. In my judgment that is not such an offer as is authorized by sub-s. 1. It does not follow, however, that the 1902 company may not be able, in some shape or form, to bring themselves within sub-s. 1. In the first place, it is possible for them to alter their articles of association, and it is also possible for them to make their offer, when they do make it, in a different form from that contemplated by the circular to which I have referred. It seems to me, therefore, that any order which is made granting an injunction ought to reserve to the 1902 company an opportunity of reconsidering their position, and taking such steps as may bring them within sub-s. 1 of s. 8.

Those are the two principal questions which have been dealt with. A third question which the Lord Justice has briefly mentioned, and which is one of some importance, has also been argued. I do not propose to go into it at this period of the day at length (1), but simply to state that in my judgment the proposed sale of the undertaking of the 1898 company in consideration of partly paid-up shares of the new company is not beyond the powers of the 1898 company as defined by its memorandum of association.

COZENS-HARDY L.J. I am of the same opinion.

The fundamental point seems to be this, that there are not here two contracts of sale and purchase; there is really only

(1) The delivery of the judgments of the Court commenced about 4 o'clock

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one. There never was a moment of time in which the company which has been called the intermediary company could become owners of the property of the 1898 company, and deal with it as they thought fit; for, on looking at the contracts, one finds that the intermediary company could only pay the 1898 company by means of an allotment of shares in the 1902 company, which they, the intermediary company, could only get by transferring all that they were said to have themselves purchased. In short, I think we should be shutting our eyes to all the manifest inferences from the documents and facts, if we did not see that this sum of 12,300*l.* was plainly remuneration for underwriting, and that this arrangement of the intermediary company and the two agreements was merely a complicated and involved mode of securing the requisite underwriting. If so, it seems to me to follow necessarily that the transaction falls within sub-s. 2 of s. 8: the 12,300*l.* was consideration given for subscribing, or agreeing to subscribe, for shares in the 1902 company.

It only remains then to consider whether the transaction falls within the protection conferred by sub-s. 1. In my view it does not; and I think so for several reasons. In the first place, there is, in my opinion, no offer of the shares to the public by anybody. Certainly there is no such offer of the shares to the public by the 1902 company as I think is implied by the language of the section. The only offer to the public, if there be any, is by the liquidator of the 1898 company. And lastly—but this is by no means of the least importance—this commission is one which is not authorized by the articles of association of the 1902 company. The event has not happened in which the payment is authorized; and the requirement in the articles that the commission shall be fixed at a certain rate has not been complied with.

For all these reasons it seems to me that the payment cannot be justified. It is hit by sub-s. 2, and it is not protected by sub-s. 1. There must, therefore, be a declaration to that effect, and an injunction upon that footing; but it will be understood that the Court is not expressing any opinion, one way or the

other, as to whether the payment can be brought within sub-s. 1 of s. 8. We wish to keep that open.

The defendants must pay the costs of the action.

The following were the short terms of the judgment, as sanctioned by the Court:—

Add the 1902 company as defendants. Add one of the signatories of the memorandum of the 1902 company as a co-plaintiff (with his consent in writing). By consent treat writ and statement of claim as amended for this purpose, and also treat motion as hearing. Declare that the agreement between the Associated Guarantors and the 1902 company, so far as it provides for the payment of 12,300*l.* by the 1902 company, provides for a payment of commission which is within and prohibited by the prohibitive part of s. 8, sub-s. 2, of the Companies Act, 1900; but this declaration is to be without prejudice to the question whether the payment can be validated under sub-s. 1 of s. 8, and so brought within the saving words "save as aforesaid" of sub-s. 2. Perpetual injunction to restrain the 1902 company from applying their capital in paying the 12,300*l.* or any part thereof under their agreement; but this injunction is not to prevent such payment if the 1902 company can comply with sub-s. 1 of s. 8, as to which the Court expresses no opinion.

Defendants to pay plaintiffs' costs of action.

Solicitors: *Burn & Berridge; Paines, Blyth & Huxtable; Booth & Smee.*

G. I. F. C.

C. A.

1902

June 24;
July 1;
Aug. 11;
Dec. 6, 18.

AFLALO *v.* LAWRENCE & BULLEN, LIMITED.

[1900 A. 1714.]

Copyright — Encyclopædia — Article — Author and Publisher — Contributor, Payment of — Agreement — Ownership of Copyright in Contributions — Proprietor — Inference of Law and Fact — "Book separately published" — Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18.

The plaintiff A. was employed by the defendants, a firm of publishers, to edit an encyclopædia on sport, and it was a term of the agreement that he should be remunerated for his editorial services by a lump sum, for which he was to contribute certain articles without further fee. The plaintiff C. was also employed by the defendants to contribute certain articles to the encyclopædia at so much per thousand words. The employment of each of the plaintiffs was the subject of a written agreement; but neither agreement contained any stipulation as to the proprietorship in the articles to be contributed.

Under their agreements both plaintiffs contributed signed articles, of the copyright in which they were registered respectively as proprietors, and these articles appeared in the encyclopædia in due course.

Subsequently the defendants published a book on sport containing copies of these articles, whereupon the plaintiffs brought an action for an injunction to restrain the defendants from republishing the articles in that form:—

Held, by Romer and Stirling L.JJ. (Vaughan Williams L.J. dissenting), that there were no special circumstances, either in the nature of the encyclopædia itself as a publication or in the terms of the employment, to justify the inference that the copyright in the articles contributed by the plaintiffs was to belong to the defendants under s. 18 of the Copyright Act, 1842; and that, on that ground—and also on the further ground that each of the signed articles was "separately published" within the meaning of those words as used in the definition of a "book" in s. 2 of the Act, so as to give the author the copyright under s. 3—the plaintiffs were entitled to an injunction.

Per Romer and Stirling L.JJ.: The mere circumstance that the writer of an article for an encyclopædia is employed and paid by the proprietor of the encyclopædia is not in itself sufficient to justify the inference, either in law or in fact, that the copyright in the article belongs to that proprietor under s. 18 of the Act.

Sweet v. *Benning*, (1855) 16 C. B. 459, commented on.

Johnson v. *George Newnes, Limited*, [1894] 3 Ch. 663, approved of.

Decision of Joyce J., [1902] 1 Ch. 264, affirmed.

APPEAL from Joyce J. (1)

The question in this case was whether the plaintiffs, who

(1) [1902] 1 Ch. 264.

were paid contributors of signed articles to an encyclopædia on sport, were entitled to sue the defendants, the publishers of the encyclopædia, for having, without their, the plaintiffs', consent, published the articles in a book called "The Young Sportsman," the question of law being what were the rights of the parties under the Copyright Act, 1842 (5 & 6 Vict. c. 45)—whether, in the absence of express agreement on the subject, the copyright in the articles remained vested in the plaintiffs as the authors, or whether in the circumstances of the case, and especially having regard to the fact that the plaintiffs had been employed and paid by the defendants to contribute the articles, the copyright in them was the property of the defendants.

The facts are fully stated in the report of the case below.

Joyce J. held that the copyright in the articles belonged to the plaintiffs and not to the defendants, and granted a perpetual injunction restraining the defendants from further publishing "The Young Sportsman," or any other book, save and except the encyclopædia, containing any copy of the articles written by the plaintiffs respectively; with an inquiry as to damages.

The defendants appealed. The appeal was opened on June 24, 1902.

Younger, K.C., and *T. L. Gilmour*, for the defendants, in addition to the arguments used and the authorities referred to by them in the Court below, cited *Barfield* v. *Nicholson* (1) and *Hatton* v. *Kean* (2) in support of the proposition that the person who forms the plan and embarks in the speculation of a work, and employs and pays persons to compose various portions, is the true author and proprietor. If the plaintiffs in the present case desired to retain their copyright in the articles they contributed, they should have made it a term of their employment that the separate right of publication should be reserved to them, as was done in *Johnson* v. *George Newnes, Limited.* (3) In the absence of evidence fixing the rights of the parties, where an author is employed and paid by a publisher for writing an article, the presumption is that the employment

(1) (1823-4) 2 L. J. (O.S.) 90, 102; 2 S. & S. 1; 25 R. R. 144.

(2) (1859) 29 L. J. (C.P.) 20.

(3) [1894] 3 Ch. 663.

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was on the terms that the copyright in that article should belong to the publisher, and the onus lies on the author or contributor of proving the contrary. (1)

(1) The following are the provisions of the Copyright Act, 1842 (5 & 6 Vict. c. 45), which were referred to in the arguments and in the judgments of the Court :—

Sect. 2: "And be it enacted, That in the construction of this Act the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published . . . . that the word 'copyright' shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied . . . ."

Sect. 3: "And be it enacted, That the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns . . . ."

Sect. 18: "And be it enacted, That when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act; except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act: Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may

Hughes, *K.C.*, and *R. J. Parker*, for the plaintiffs, repeated their argument in the Court below, and, in addition to the cases there cited, referred to *Shepherd* v. *Conquest* (1), *Levy* v. *Rutley* (2), and *Eaton* v. *Lake* (3) as authorities shewing that, in analogous cases under the Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15), the mere fact of employment and payment of an author of a composition did not alter the author's property in his composition, the copyright in which therefore remained in himself.

[VAUGHAN WILLIAMS L.J. Can literary collections be made a subject of copyright?]

Yes; for instance, a collection of poems or prose compositions: Copinger on Copyright, 3rd ed. pp. 40, 207.

[STIRLING L.J. That was the question in *Moffatt & Paige, Limited* v. *George Gill & Sons, Limited.* (4)]

The question whether the copyright in a work passes from the author to the publisher must depend upon the circumstances of each case. This is the common case of a person writing an article for insertion in a serial belonging to some one else. Whether it shall belong to the writer or not is a matter of special bargain. Why should the inference be more one way than the other? There is nothing unreasonable in assuming or inferring that the article belongs to the author so that the publisher of the serial shall not be entitled to publish

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hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

Sect. 19: "And be it enacted, That the proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall under this Act, on entering in the said book of registry the title of such encyclopædia, review, periodical work, or other work published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first number or volume first published after the passing of this Act in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof."

(1) (1856) 17 C. B. 427.
(2) (1871) L. R. 6 C. P. 523.
(3) (1888) 20 Q. B. D. 378.
(4) (1902) 18 Times L. R. 547.

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it in a separate form. The question is, Are you bound, because of the nature of the thing contracted to be written, to assume, for business purposes, that the copyright passes to the publisher? We submit not. The dicta in *Sweet* v. *Benning* (1) go too far; and so the Court of Appeal seems to have thought in *Lamb* v. *Evans*. (2)

T. L. Gilmour in reply.

Cur. adv. vult.

Aug. 11. VAUGHAN WILLIAMS L.J. Before delivering judgment in this case we desire to hear argument upon a further point, namely, as to the meaning of the words "separately published" in the definition of a "book" in s. 2 of the Act—whether, under the circumstances and having regard to that definition and to s. 3, the plaintiffs have any such right as entitles them to maintain this action—copyright or any other right. The appeal shall be restored to the list for argument on this point early next sittings.

Dec. 6. *Hughes, K.C.*, and *R. J. Parker*, for the plaintiffs. If the articles in question come within the definition of a "book" in s. 2 of the Act, then, by s. 3, the copyright belongs to the author. It is submitted that every "part or division of a volume" which can be segregated from the rest of the volume is "separately published" within the meaning of s. 2, and therefore constitutes a "book," and is protected by s. 3. The intention of the Act was to protect an author of a book published in separate parts, e.g., the novels of Charles Dickens, which were published in monthly parts. Each such part was by s. 2 made a "book." Every part separately published is to be protected, though not in the popular sense of the word a "book": *White* v. *Gerock* (3) When a new edition of an old work is published with an addition of new matter, such as notes, protection can be obtained for the new matter as a "book" by registration under the Act, though the old matter would not be protected: *Hayward Brothers* v. *Lely*

(1) 16 C. B. 459.
(2) [1893] 1 Ch. 218.
(3) (1819) 2 B. & Al. 298; 22 R. R. 786.

& Co. (1) That the author of a contribution to a periodical is protected by registration under the Act is shewn by *Johnson* v. *George Newnes, Limited.* (2) The word "separately" is used in s. 2 in a different sense from that in which it is used in s. 18. The right given to the author by s. 3 remains except so far as it is altered by s. 18. The latter section has no application unless the work or article has been composed on the terms that the copyright therein shall belong to the proprietor, projector, publisher, or conductor of the work published in a series. Sect. 18 provides that after the term of twenty-eight years from the first publication the right of publishing in a separate form "shall revert to the author for the remainder of the term given by this Act." To "revert" is to go back, and this implies that the copyright was in the author before. The publisher's term is a limited one. To hold that these articles are not "separately published" would be inconsistent with many decided cases. The result of the defendants' argument would be that neither the author nor the publisher would have any copyright in the articles.

Younger, K.C., and *T. L. Gilmour*, for the defendants. It is submitted (1.) that these articles are not "books," and (2.) that they are not "separately published." In ordinary language they are certainly neither the one nor the other. Are they so within the meaning of the Act? It is submitted (1.) that they are not "books" within s. 2. They are "essays or articles" in an encyclopædia, and such compositions are not expressly mentioned in s. 2, though they are expressly mentioned in s. 18.

(2.) It is contended that these articles are not "separately published." Some limitation must be put upon those words. If a contributed article were omitted and the book would be incomplete without it, the article is not "separately published." This work would not be an "encyclopædia" if any of the articles in it were omitted. *Johnson* v. *George Newnes, Limited* (2), was a simple case and quite different from the present; there any one of the stories might have been omitted and yet the remainder of the series would have been complete.

(1) (1887) 56 L. T. 418. (2) [1894] 3 Ch. 663.

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Here, if the article upon "Angling" were omitted, the unity of the work would be destroyed; it would no longer be an "encyclopædia of sport." The line must be drawn somewhere. An article which, as in the present case, forms a substantial part of the whole, cannot be said to be "separately published." It is quite a different case from that of three poets publishing jointly a volume of poems. In that case there would be no copyright in the whole. Here the copyright of the whole work is by s. 18 vested in the publisher or conductor. The right of the plaintiffs must depend upon the question whether these articles are "books" within s. 2. "Separate publication" must have the same meaning in s. 2 as in s. 18. Every difficulty will be got rid of by holding that there is a transfer of the copyright to the publisher or conductor. The author could obtain the copyright by publishing the article separately. *White* v. *Gerock* (1) is distinguishable from the present case, for in the Copyright Act then in force the words "separately published" did not occur. In the Act of 1842 the Legislature contemplated two distinct modes of publication; sect. 3 applies to an author who comes to a publisher and offers him a work for publication, while s. 18 is intended to meet the case of a work which is projected or owned by a publisher. It is no doubt possible, if the defendants are right, that there may be no copyright in any one. And indeed, in the Fine Arts Copyright Act (25 & 26 Vict. c. 68), it is evident that the Legislature contemplated the possibility of there being no copyright in any one.

Hughes, K.C., in reply.

Cur. adv. vult.

Dec. 18. VAUGHAN WILLIAMS L.J. In this case I differ from my learned brethren, and also from Joyce J. [After stating the nature of the action and reading the order of Joyce J., his Lordship proceeded:—] The whole case turns upon the question of the respective rights of the author and the publisher under the Copyright Act, 1842 (5 & 6 Vict. c. 45).

The judgment of Joyce J., in my opinion, cannot be sup-

(1) 2 B. & Al. 298; 22 R. R. 786.

ported unless the plaintiffs have vested in them the copyright in their contributions to the encyclopædia. The Act, by s. 2, defines the word "copyright" as meaning "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." Sect. 2 also defines the word "book," saying that it "shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published." Then s. 3 enacts that the copyright in every book—i.e., the sole and exclusive liberty of printing or otherwise multiplying—shall endure for the natural life of the author and for a further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns. Joyce J. does not decide that the plaintiffs can themselves republish the articles contributed to the encyclopædia; but it seems to me that they do not get the copyright in those articles by virtue of s. 3 of the Act, which only deals with "books"; and by the definition in s. 2 nothing is a "book" which is not separately published; and, in my judgment, these articles in "The Encyclopædia of Sport" were not separately published. This encyclopædia, in my opinion, is a complete publication in itself, projected by the proprietors, edited throughout by one of the plaintiffs as the paid agent of the defendants, the publishers.

I will now inquire whether the plaintiffs have acquired the copyright in their contributions under any other part of the Act. Sect. 18 seems to be the only possible section. That section says this: "Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

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This proviso, which seems to be the only part of the section vesting the copyright in contributors, does not apply, because there is clearly no reservation, express or implied, in such a case. The earlier prohibitive proviso limiting the right of separate publication by the publisher only applies to periodicals.

I will next deal with the question whether the copyright has vested in the defendants, the publishers. Joyce J., in deciding that it does not, assumes that he must so decide unless he can find special circumstances from which the Court could infer a term vesting the copyright in the publishers. In my opinion, the true result of the decision in *Sweet* v. *Benning* (1) is that, primâ facie, in the absence of evidence to the contrary, the law will infer from the fact of employment of a person to write articles for an encyclopædia, review, magazine, or periodical work, and payment to him for so doing, that one of the terms of such employment was that (subject to the limitation pointed out in s. 18) the copyright should belong to the person who employed and paid the author. The case is one in which the Court held that on the proof of employment and payment a rebuttable presumption would arise, and that the onus probandi as to the employment being on the terms that the copyright should belong to the paid contributor would lie on, or in a case where the evidence was oral shift to, the party desiring to negative the presumption. The law in such a case supposes the matter contained in the issue: see Gilbert's Law of Evidence, p. 148, cited by Lord Ellenborough in *Williams* v. *East India Co.* (2); and in such case "the opposite party (that is, the party who contends for the contrary of that which the law supposes) must be put into proof of it by a negative." In my judgment, it makes no difference whether the rebuttable presumption arises on the relation of the parties as proved by oral evidence, or on the relation of the parties as arising on the construction of an instrument.

I will now examine the judgments in *Sweet* v. *Benning* (1) in detail to shew that this is the effect of the judgments in that case. Jervis C.J. says in his judgment (3): "At the close

(1) 16 C. B. 459.

(2) (1802) 3 East, 192, 200; 6 R. R. 589, 594.

(3) 16 C. B. 480.

of the argument, we intimated an opinion that the plaintiffs had a copyright within the meaning of the 18th section, because it seemed to us,—and I believe we all remain of the same opinion,—that, where the proprietors of a periodical employ a gentleman to write a given article, or a series of articles or reports, expressly for the purpose of publication therein, of necessity it is implied that the copyright of the articles so expressly written for such periodical, and paid for by the proprietors and publishers thereof, shall be the property of such proprietors and publishers; otherwise, it might be that the author might the day after his article has been published by the persons for whom he contracted to write it, republish it in a separate form, or in another serial, and there would be no correspondent benefit to the original publishers for the payment they had made." It will be observed that the observations of the Chief Justice are as general as can be; his judgment is based upon an implication from the employment to write an article for a periodical. It is an implication which will arise from the employment, in the absence of an express bargain in the contract. The conclusion of the Chief Justice is in no way based upon any special circumstances or conditions arising or appearing in respect of the employment of the reporters for the *Jurist*.

And again, in the same case, Maule J. in his judgment says this: [His Lordship read from the words "But, though no express words to that effect" (1) down to "the limitation pointed out in the 18th section of the Act," and proceeded:—] Here again it is obvious that the inference on which Maule J. bases his conclusion is an inference which will arise from the mere employment to write the article "or to do anything else for" an employer, in the absence of evidence to the contrary. The fact that the Copyright Act vests generally the copyright in the author would prevent this inference, if it were not for the exception in the 18th section, which makes it possible for the copyright in some cases to vest in the publishers, and lets in to that extent the ordinary inference in favour of the employer.

(1) 16 C. B. 484.

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Cresswell J., it is true, says (1): "Under the circumstances stated in the special case, the copyright in the reports in question clearly vested in the plaintiffs as the proprietors of the work for which they were prepared." But it is plain that he means by this, in the absence of circumstances negativing the primâ facie inference from employment; for he begins his judgment by saying, "As to the first point, I do not think it necessary to add anything to what has fallen from my Lord and my brother Maule."

Crowder J., in his judgment (2), after stating that his mind had "undergone considerable fluctuations as to both points" during the argument, says this: [His Lordship read from "Looking at the facts stated in this special case" (2) down to "that the latter should have the copyright therein" (3), and proceeded:—] Now, although Crowder J. speaks of the conclusion as a conclusion of fact to be drawn by a jury from the facts stated in the special case, it is plain that he begins with inferring from the general nature and character of the employment that the proprietors of the work should have the copyright in the articles; and his conclusion from the facts stated in the special case is only that there is nothing in those facts from which a reservation of copyright in the authors is to be assumed as an inference of fact.

In my opinion, both the judgments and the whole course of the argument, and the observations in the course of it, all shew that primâ facie the Court will infer, in the absence of evidence to the contrary, from the fact of employment and payment, that one of the terms was that the copyright should belong to the employer.

It is said, and truly said, that in *Walter* v. *Howe* (4) Sir G. Jessel expressed an opinion that employment and payment afforded no primâ facie evidence that it was a term of the employment that the copyright should belong to the employer; but *Sweet* v. *Benning* (5) was not cited to Sir G. Jessel, and his actual judgment is based on the absence of registration.

(1) 16 C. B. 488.
(2) Ibid. 489.
(3) 16 C. B. 490.
(4) (1881) 17 Ch. D. 708.
(5) 16 C. B. 459.

Moreover, I think that the Court of Appeal, in *Lamb* v. *Evans* (1), distinctly affirms *Sweet* v. *Benning* (2) as an authority for the proposition in the judgment of Maule J. in that case, that where a man employs another to write an article or do anything else for him, unless there is something in the surrounding circumstances or in the course of dealing between the parties to require a different construction, in the absence of special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer: for Lindley L.J. says this (3): [His Lordship read from "If there is no express agreement" down to "that the copyright in these headings, which are of no use to anybody but the plaintiff, should be his," and proceeded:—] It seems to me that these observations, notwithstanding the reference to the fact that in the case before the Court the articles were merely headings of groups of advertisements, clearly affirm the view of Maule J. as to the primâ facie inference arising from employment and payment.

Then Bowen L.J. in his judgment says this: [His Lordship read from "The question which has been argued before us by Mr. Farwell was" (4) down to "the true interpretation of the section, apart from authority" (5), and proceeded:—] And Kay L.J. says this: [His Lordship read from "What is the fair inference from the facts of the case?" (6) down to "should belong to the owner of the book," and proceeded:—] Now, if the view is right that, in the case of such a book so composed and published, employment and payment afford primâ facie evidence that, as between the publisher of the book and the various authors employed by him to write the articles for the book, the publisher will have in himself whatever property the law will give him in that book, it seems to me that the defendants ought to succeed in this case, because I find neither in the written agreement nor in any of the circumstances of the case, nor in the nature of the encyclopædia and articles, anything

(1) [1893] 1 Ch. 218.
(2) 16 C. B. 459.
(3) [1893] 1 Ch. 225.
(4) [1893] 1 Ch. 227.
(5) Ibid. 228.
(6) Ibid. 233.

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whatsoever to negative the primâ facie evidence. On the contrary, it is impossible to suppose, as a matter of business, that the plaintiffs were employed by the defendants, the publishers, on such terms that the plaintiffs could themselves, the day after the publication of the encyclopædia, print, publish, and sell these very articles. I decline to draw the inference that the employment of the plaintiffs was on the basis that they should license the defendants to issue the first publication of the articles. I wish to add that, in my judgment, an inference of this sort from the nature of the employment, or from the relation of the parties, is an inference which equally arises whether the contract is oral or whether it is contained in a written document intended to be the whole agreement between the parties. It seems to me that the inference that the property should pass is not an addition to the contract expressed in writing, but an inference from it. It is no more an addition to the written contract than it would be an addition to a written contract of agency to infer from the relation thus created that the principal would indemnify the agent.

I think that we cannot support the judgment of Joyce J. without overruling the judgment in *Sweet* v. *Benning* (1), which I do not think we ought to do, even if we thought it wrong, having regard to the length of time which has elapsed since it was decided and its approval by the Court of Appeal in *Lamb* v. *Evans*. (2) For myself, I think that the decision in *Sweet* v. *Benning* (1) was right and is good law.

In the foregoing judgment I have dealt with the authorities bearing directly on s. 18 of 5 & 6 Vict. c. 45, but before concluding I should like to draw attention to one authority, amongst others, which indirectly affirms the principle that an employer retaining the services of an author may thereby become the proprietor of the work produced. In *Shepherd* v. *Conquest* (3) Jervis C.J. goes through the authorities bearing on this question, and obviously inclines to the affirmative view that, under s. 18, an employer of an author may become ab initio the owner of the copyright in the author's work.

(1) 16 C. B. 459. (2) [1893] 1 Ch. 218.
(3) 17 C. B. 427.

[His Lordship then read a passage from the judgment of Jervis C.J. commencing (1) "The plaintiffs have no right, therefore, unless it can be established," and ending "or the right of representation, can become vested ab initio in an employer other than the person who has actually composed or adapted a literary work" (2), and proceeded :—] In my judgment, s. 18 distinctly recognises what is pointed out in the judgment of Leach V.-C. in *Barfield* v. *Nicholson* (3) (delivered while the Copyright Statute of Anne was in force, which contained no section equivalent to s. 18), that in a composite work the person who forms the plan and scheme of the work, and pays different artists of his own selection who, upon certain conditions, contribute to it, is the author and proprietor of the work. It seems to me that, unless we are prepared to say that the decisions which hold that the conditions of s. 18 may be satisfied in cases where there is no express term are wrong, we ought to decide in favour of the presumption arising from the payment of an author contributing to a composite work.

ROMER L.J. I think this appeal fails. The plaintiffs are admittedly the writers of the articles the subject of the action, and are primâ facie entitled to the ordinary rights of authors. If, then, the defendants insist that they have acquired some of the authors' rights so as to justify them in publishing the articles separately in the manner they are now doing, the onus is upon them of proving that those rights have been acquired by them. They say they discharge the onus by shewing that, in accordance with the provisions of s. 18 of the Copyright Act, 1842, the copyright in the articles is in them. Now, under s. 18 the defendants must establish three things—(1.) employment by them of the plaintiffs to compose the articles; (2.) that the articles were composed on the terms that the copyright should belong to the defendants; and (3.) that the articles were paid for by the defendants.

It appears to me, on this Act, that it cannot rightly be said that, in every case of an article written for an encyclopædia,

(1) 17 C. B. 443.
(2) Ibid. 444-5.
(3) 2 L. J. (O.S.) 90, 102; 2 S. & S. 1; 25 R. R. 144.

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mere proof by the proprietor of the encyclopædia of employment and payment of the writer of the article primâ facie gives the copyright to the proprietor. The Legislature has expressly said that, in addition to employment and payment, it must be established that the employment was on the terms that the copyright should belong to the proprietor. It cannot be, therefore, that those terms must of necessity legally be implied from the facts of employment and payment. Nor, in my opinion, ought those terms to be implied in every case from the employment and the payment if the author does not prove that the terms were not part of the contract of employment. I do not think that upon proof by the proprietor of employment and payment there is, as a matter of law, thrown upon the author the onus of proving that it was no part of the contract of employment that the copyright should belong to the proprietor. It must be borne in mind that s. 18 is dealing with a class of books and periodicals as to which it may well be supposed that payment by the proprietor to the author for an article is only for the right of separate publication in the book or periodical, and not for the copyright. It may well be worth while for the proprietor to employ and pay a writer to write an article on terms of the copyright remaining with the writer, inasmuch as the proprietor gets the benefit he chiefly desires by being able to publish the article as part of his book or periodical. No doubt, in some cases, though the terms that the copyright shall belong to the proprietor may not have been expressly mentioned, yet such terms may be inferred in favour of the proprietor from the special circumstances of the case; but there must be special circumstances which justify the inference.

I therefore think that the observations in reference to this question of Jervis C.J. and Maule J. in *Sweet* v. *Benning* (1) go too far, unless those observations are construed as being limited by implied reference to some particular circumstances of that case. I am fortified in this view by the observations of Shadwell V.-C. in *Brown* v. *Cooke* (2) and of Sir G. Jessel M.R. in *Walter* v. *Howe*. (3) Now, are there in the present case

(1) 16 C. B. 459.

(2) (1846) 16 L. J. (Ch.) 140.

(3) 17 Ch. D. 708.

such special circumstances as would justify the inference? I think not. In the case of the plaintiff Cook there appear to me to be no special circumstances justifying such an inference. The case of the plaintiff Aflalo is not so clear. But in his case there is his written contract with the proprietor of the encyclopædia, which written contract purports to set forth the exact terms on which he was employed. That writing contains no term that the copyright in the articles contributed shall belong to the proprietor of the encyclopædia; and, in my opinion, such a term ought not under the circumstances to be inferred as a matter of fact, and I have previously pointed out why, in my opinion, it cannot be inferred as a matter of law. I think, therefore, the contention of the defendants under s. 18 fails.

With regard to the further point taken by the defendants, and which formed the subject of the arguments on the rehearing, I need only say that, after hearing those arguments, I still adhere to the view taken by me in *Johnson* v. *George Newnes, Limited.* (1) That decides this further point against the appellants, for, in my opinion, the articles now in question were "separately published" within the meaning of those words as used in the definition in the Act of a "book."

I may perhaps add, with reference to an argument based on the last proviso in s. 18, that that proviso is dealing with the case of an author of a composition having reserved or retained a right of separate publication; and this seems to presume that he has not the ordinary copyright in him; and my further consideration of the proviso accordingly still leads me to the conclusion that the proviso is only addressed to the case where, under the provisions of the first part of the section, the author has parted with his copyright. But even if I am wrong in this, and the proviso is to have a larger operation because of the words "every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form," yet even then the proviso clearly implies that the author is alone entitled to the right of separate publication; and, this being so, in the present case the plaintiffs would be entitled to the

(1) [1894] 3 Ch. 663.

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injunction granted by the Court below, for the defendants, by separately publishing, infringe upon the authors' rights and should be restrained.

STIRLING L.J. The first question in the action is whether the defendants are or are not entitled to the copyright in four separate articles signed by the plaintiffs respectively, and contributed to "The Encyclopædia of Sport" published by the defendants. The answer to the question depends on s. 18 of the Copyright Act, 1842; and under it the defendants, in order to make out their title, must establish three things—(1.) that they employed the plaintiffs respectively to compose the respective articles for publication in or as part of the encyclopædia; (2.) that the articles respectively were composed under such employment, on the terms that the copyright therein should belong to the defendants; and (3.) that such articles have been paid for by the defendants. There is no dispute that the defendants have proved the existence of the first and third of these requirements, but there is a great contest as to whether or not they have established the second.

Now the agreements between the plaintiffs and the defendants have been reduced to writing; and neither agreement contains any express stipulation as to the proprietorship of the copyright in the articles. It has, however, been decided in two cases—*Sweet* v. *Benning* (1) and *Lamb* v. *Evans* (2)—that such stipulations need not be express, but may be inferred; and although in those cases the agreements were verbal only, it is contended that the like inference ought to be drawn in the present case.

In *Sweet* v. *Benning* (1) the learned judges who took part in the decision give the reasons for it in somewhat different terms. Crowder J. appears to me to have arrived at his conclusion as to the terms on which the reports then in question were composed as an inference of fact from the general nature and character of the employment. I also think that each of the learned judges who constituted the Court of Appeal in *Lamb* v. *Evans* (2) drew a similar inference from the nature of the

(1) 16 C. B. 459. (2) [1893] 1 Ch. 218.

employment and the surrounding circumstances of the case. I admit that Jervis C.J. and Maule J. in *Sweet* v. *Benning* (1) used language which is susceptible of the interpretation that the inference drawn by them was one of law and not of fact; but I am not sure that they really meant this; if they did, I can only say, with all the deference which is justly due, and which I am most willing to pay, to such high authorities, that I am unable to see that it is in accordance with a sound construction of an Act of Parliament which requires three conditions to be satisfied in order that the copyright may belong to the publisher, to hold that the existence of one of the three is to be inferred as a matter of law from that of the other two. I think, therefore, that the inference which has to be drawn is one of fact and not of law. If, in the present case, we had to deal with verbal contracts, I should feel great difficulty in drawing an inference of fact similar to that which was drawn in *Sweet* v. *Benning* (1) and *Lamb* v. *Evans*. (2) The plaintiff Cook, for example, is a writer of great reputation on the subjects of the articles composed by him; he received for each what certainly appears the moderate sum of 10*l*. So far as I can see, such an expenditure on the part of the publisher might well be made to secure the increase of reputation likely to accrue to their encyclopædia by reason of its containing articles by a writer of such eminence, even though the copyright should remain vested in him. The inference appears to me to be still more difficult to draw where, as here, the agreements between the plaintiffs and defendants have been reduced to writing. The written documents on the face of them appear to contain the whole of the agreements between the parties, and there is no evidence that they were intended to express only part of them. In these circumstances the presumption is that the writings contain everything material which has been agreed on; and evidence of surrounding circumstances is only admissible for the purpose of construing them. When the documents are construed in the light of surrounding circumstances it does not appear to me that any stipulation as to proprietorship of the copyright can be spelt

(1) 16 C. B. 459. (2) [1893] 1 Ch. 218.

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out of either of them. Incidents as to which a written contract is silent may, no doubt, be annexed either by virtue of some usage or by the general law, as, for example, the obligations as to title imported into a contract for the sale of land, and the warranty of seaworthiness implied in a policy of marine insurance. In the present case there is no evidence of any usage, and, as I have already said, it is not, in my judgment, in accordance with the provisions of s. 18 of the Copyright Act, 1842, to hold that one of three necessary conditions for the existence of the proprietorship of the copyright can, as a matter of law, be inferred simply from the existence of the other two. If such an inference were drawn in this case it seems to me that we should be using the surrounding circumstances, not to construe the documents, but to add to them.

The second question is whether the plaintiffs are entitled to any copyright or right of action which would enable them to maintain this action. It is contended that the plaintiffs are entitled to the copyright in these articles by virtue of s. 3 of the Copyright Act, 1842, which provides "that the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure" for the period therein mentioned, "and shall be the property of such author and his assigns." It is said that none of these articles constitutes "a book," but that each of them is only part of a book. In *White* v. *Gerock* (1) a precisely similar question arose under the statute 54 Geo. 3, c. 156 (repealed by the Copyright Act, 1842), which provided that from and after the passing of the Act the author of any book or books which should thereafter be composed, and be printed and published, and his assignee or assigns, should have the sole liberty of printing and reprinting such book or books for the time mentioned. The plaintiff there sued in respect of the infringement of the copyright in a musical composition which formed a single sheet of a book containing a large number of other musical pieces not composed by the plaintiff. It was held by the Court of King's Bench that he was entitled to maintain

(1) 2 B. & Al. 298; 22 R. R. 786.

the action. Abbott C.J. said (1): "I am of opinion, that any composition, whether large or small, is a book within the meaning of this Act of Parliament. It is perfectly clear, that it would be a book, if printed as a separate and distinct work; and if so, it seems to me, that it does not lose that character, by being found in company with other compositions." These observations apply to the signed articles of which the plaintiffs claim the copyright. It is said, however, that this decision does not apply to the Act of 1842, because s. 2 provides "that in the construction of this Act the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published"; and it is said that none of these articles constitute a volume, or a part or division of a volume, separately published. In my judgment, this argument ought not to prevail. The object of the Act of 1842, as expressed in the preamble, was "to afford greater encouragement to the production of literary works of lasting benefit to the world"; and the provisions of the statute shew that this object was intended to be effected by conferring greater benefits on authors than were enjoyed by them under the preceding statutes. It could not have been the intention of the Legislature, therefore, to take away from authors any benefit which they possessed before, and the definition clause ought not to be read so as to produce such an effect, unless its language is susceptible of no other meaning; and, in my opinion, the true meaning and effect of that language is not to cut down but to extend the meaning of the word "book." Even if this were not so, I should still be of opinion that the plaintiffs' signed articles, being distinguished from the rest of the volumes in which they are found, were separately published within the meaning of s. 2. I think, therefore, that under s. 3 the plaintiffs acquired copyright in these articles subject to the provisions of s. 18, if and so far as that section affects the rights of the plaintiffs. This conclusion agrees with the opinion expressed by Shadwell V.-C. in *Bishop of Hereford* v. *Griffin* (2),

(1) 2 B. & Al. 300.

(2) (1848) 16 Sim. 190.

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by Stuart V.-C. in *Smith* v. *Johnson* (1), and Romer L.J., when a judge of first instance, in *Johnson* v. *George Newnes, Limited.* (2)

There remains the question whether there is anything in s. 18 to affect the rights of the plaintiffs. It was suggested that the words at the close of the section—"Every author reserving, retaining, or having such right" (that is, a right of publishing his composition in a separate form) "shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid"—might be held to impose on the plaintiffs the obligation of publishing their articles in a separate form in order to acquire the copyright. I am not, however, prepared to differ from the construction placed on these words by Romer L.J. in *Johnson* v. *George Newnes, Limited* (2), namely, that they only refer to a case where the author has parted in the first instance with the copyright to the proprietor of the work in which it appears. In any case, I should be of opinion that, even if the plaintiffs were not yet entitled to the copyright in these articles, they would be entitled to restrain the defendants from publishing them separately, on similar grounds to those given by Lord Hatherley, when Vice-Chancellor, in *Mayhew* v. *Maxwell.* (3)

Although I regret that Vaughan Williams L.J. differs, and I necessarily feel some distrust as to the conclusion at which I have arrived, I think that the appeal fails, and ought to be dismissed.

Solicitors: *Dixon, Elkin & Dixon; Field, Roscoe & Co.*

(1) (1863) 4 Giff. 632. (2) [1894] 3 Ch. 663.
(3) (1860) 1 J. & H. 312.

G. I. F. C.

In re BARROW-IN-FURNESS CORPORATION AND RAWLINSON'S CONTRACT.

KEKEWICH J.

1903

Jan. 13.

[1902 B. 4297.]

Will—Executor—Charge of Debts and Legacies—Power to sell Real Estate—Law of Property Amendment Act, 1859 (*Lord St. Leonards' Act*, 22 & 23 *Vict. c.* 35), *ss.* 16, 18—*Devise to Person or Persons in Fee—Devise to Son on attaining Twenty-five—Power of Executor to grant Easement—Special Act—Construction—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 7.

A testator appointed an executrix, charged his real estate with the payment of his debts and legacies, and devised his real estate in fee to his first son who should attain the age of twenty-five. Thirteen years after the testator's death his eldest son attained twenty-five:—

Held, that the devise to the son was not a devise to any person in fee or in tail within the meaning of s. 18 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), that that section did not apply, and that under s. 16 the executrix had power to sell the real estate.

In re Wilson, (1886) 54 L. T. 600, applied.

In s. 7 of the Lands Clauses Consolidation Act, 1845, the expression "executors and administrators" is to be restricted to executors and administrators who are seised, possessed of, or entitled to land or any estate or interest therein.

Where, therefore, under a special Act persons empowered by the Lands Clauses Acts to sell and convey or release lands were empowered if they thought fit to grant easements:—

Held, that an executrix who had no estate or interest in land, but only a power to sell it, was not empowered to grant an easement over it.

ADJOURNED SUMMONS under the Vendor and Purchaser Act, 1874.

William Sawrey Rawlinson, of Diddon Hall, in the county of Cumberland, by his will dated October 17, 1872, appointed his wife, Elizabeth Mary Rawlinson, and two other persons since deceased, to be executrix and executors and trustees of his will, and after bequeathing certain legacies and making a residuary bequest of his personal estate to his trustees upon trust for sale and conversion, and specifically devising certain real estate, he directed that if the moneys to arise from the conversion and getting in of his residuary personal estate, together with the moneys to arise from the sale and conversion

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of the specifically devised real estate, should be insufficient to provide for the payment of his funeral and testamentary expenses and debts other than mortgage debts affecting his real estates or any part thereof, and also to provide for the payment of the pecuniary legacies bequeathed by his will and the interest payable in respect thereof, then and in such case he thereby charged his residuary real estates thereinafter devised with the payment of such deficiency, and he authorized his trustees to raise such deficiency, and all costs, charges, and expenses to be incurred in relation thereto, by a mortgage of all or any part of his residuary real estates. The testator devised all the residue of his freehold estates to the use of his eldest or only son living at his death, in case such son should then have attained the age of twenty-five years, in fee; but if there should be no son of his living at his death who should have attained the age of twenty-five years, then to the use of such son of his as after his decease should first attain the age of twenty-five years in fee.

The testator died on June 29, 1875, and his eldest son, William Millers Rawlinson, attained the age of twenty-five on April 20, 1888. He died on March 20, 1897, having by his will, dated March 9, 1897, devised his real estate upon certain trusts by way of settlement.

By an agreement dated June 3, 1901, and made between the mayor, aldermen, and burgesses of the borough of Barrow-in-Furness of the one part, and Elizabeth Mary Rawlinson (who was then the sole executrix of the will of William Sawrey Rawlinson) of the other part, after a recital whereby it appeared that the corporation were promoting a bill in Parliament empowering them to execute certain works and acquire land for the purpose, it was agreed that Elizabeth M. Rawlinson should sell and the corporation should purchase at or for the price of 15,000*l.* the fee simple of and in certain lands and waters forming part of the residuary estate of William Sawrey Rawlinson, and also the right to lay down and maintain in perpetuity a certain line of pipes through other lands also forming part of the same residuary estate.

By the Barrow-in-Furness Corporation Act, 1901 (1 Edw. 7,

c. ccxviii.), which received the Royal assent on August 9, 1901, the corporation were empowered to execute certain waterworks and other works, and acquire certain lands and easements, including the lands and easements specified in the agreement of June 3, 1901, which agreement was set out in full in the 3rd schedule to the Act. The Act, which by s. 3 incorporated the Lands Clauses Acts, contained the following provisions:—

Sect. 22: "The agreement made between the corporation of the one part and Elizabeth Mary Rawlinson of the other part set forth in the third schedule to this Act is hereby confirmed and made binding upon the parties thereto."

Sect. 31: "(1.) The corporation may in lieu of acquiring any lands for the purpose of the conduit or line of pipes authorised by this Act acquire such easements and rights in such lands as they may require for the purpose of making maintaining cleansing repairing renewing and enlarging the conduit or line of pipes, and may give notice to treat in respect of such easements and rights, and may in such notice describe the nature thereof, and the several provisions of the Lands Clauses Acts (inclusive of those with regard to limited owners and to arbitration and the summoning of a jury) shall apply to such easements and rights as fully as if the same were lands within the meaning of those Acts.

"(2.) Provided that as regards any lands taken or used by the corporation for the purpose of such conduit or line of pipes where they are respectively laid underground the corporation shall not (unless they give notice to treat for such lands and not merely for easements therein) be required or entitled to fence off or sever such lands from the adjoining lands, but the owners or occupiers for the time being shall at all times after the completion of the works have the same rights of passing over such lands for all purposes of or connected with the use or enjoyment of the adjoining lands as if such lands had not been taken or used by the corporation.

"(3.) Provided also that (except as to land forming part of a street) nothing in this section contained shall authorise the corporation to acquire by compulsion any such easement in any case in which the owner in his particulars of claim shall

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require the corporation to acquire the lands in respect of which they have given notice to treat for the acquisition of an easement only, and every notice to treat for the acquisition of an easement shall be endorsed with notice of this provision."

Sect. 32: "Persons empowered by the Lands Clauses Acts to sell and convey or release lands may if they think fit subject to the provisions of those Acts and of this Act grant to the corporation any easement right or privilege (not being an easement right or privilege of water in which persons other than the grantors have an interest) required for the purposes of this Act in over or affecting any such lands, and the provisions of the said Acts with respect to lands and rent-charges so far as the same are applicable in this behalf shall extend and apply to such grants, and to such easements rights and privileges as aforesaid respectively."

On the investigation of the title it was objected on the part of the corporation that it was not competent for the vendor to convey the land or to grant the easement pursuant to the agreement of June 3, 1901, except with the concurrence of the other persons interested therein. On behalf of the vendor it was contended that, by virtue of the provisions of Lord St. Leonards' Act, the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35) (1), it was competent for her to convey

(1) The material provisions of the Act are as follows:—

By s. 14 a devisee in trust is empowered to sell where the testator "shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money."

Sect. 16: "If any testator who shall have created such a charge as is described in the fourteenth section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate."

Sect. 18: "The provisions contained in sections fourteen, fifteen, and sixteen shall not in any way prejudice or affect any sale or mortgage already

the land, and that the provisions of the Barrow-in-Furness Corporation Act, 1901, in effect conferred upon her the right to grant the easement.

This summons was taken out by the corporation asking that it might be declared that Elizabeth M. Rawlinson was not competent to convey the land or grant the rights agreed to be sold, and that the persons having a legal title to or legal remedy against the land and the hereditaments over which the rights were agreed to be granted were necessary and proper parties to the conveyance and grant of the land and rights.

Warrington, K.C., and *Attwater*, for the purchasers. The first question is whether the vendor in this case has any power at common law or otherwise to sell this land to the corporation for the purposes of their undertaking, and to convey the legal estate. She claims to be entitled to sell and convey by virtue of s. 16 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), and if that section stood alone there can be no doubt that she would be right. But s. 16 is qualified by s. 18, and the effect of the qualification is that, inasmuch as there was in this will a devise to the testator's eldest son in fee, s. 16 does not apply, but s. 18 does; and the title is, therefore, to be made, not by the vendor as executrix, but by or through the devisee. There are only two cases bearing on the matter: *In re Wilson* (1) and *In re Rebbeck*. (2) In *In re Wilson* (1) it was held by Kay J. that s. 18 of the Act did not apply to a devise by way of settlement, but only to a devise in fee or in tail to persons who could themselves sell or mortgage. He was dealing simply with a case in which the estate passes for an estate less than the fee

made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do."

(1) 54 L. T. 600.

(2) (1894) 63 L. J. (Ch.) 596; 71 L. T. 74.

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simple. Here the fee simple vested in the eldest son immediately on the death of the testator; he was the heir-at-law, and therefore (though not under the will) the fee was in him. *In re Rebbeck* (1) does not bear so directly on the point, but it shews the effect of s. 18. There lands were devised in fee beneficially to one of two executors, subject to a particular legacy given to the executors on trust, and it was held by Chitty J. that the case came within the excluding words of s. 18, and that the devisee alone could not make a good title to a purchaser.

Secondly, even if the vendor has power to sell the land, she has no power to grant the easement. It is not, indeed, suggested that the power to sell would enable her to grant an easement, but it is said that she has power under the special Act. Sect. 22 does not give any such power; it merely makes the scheduled contract binding as between the parties to it. Nor can s. 31 have such an effect, for it merely enlarges the Lands Clauses Acts by enabling the corporation to acquire easements for their pipes instead of acquiring the land in which the pipes are laid. Nor is s. 32 sufficient; it is merely the correlative of s. 31, and enables limited owners who could convey land under the Lands Clauses Acts to grant easements. In short, all the sections refer only to proceedings under the Lands Clauses Acts. But, further, the sections would not enable the vendor to grant an easement because she is not one of the "persons empowered by the Lands Clauses Acts to sell and convey or release lands" within the meaning of s. 32 of the special Act. Those persons are enumerated in s. 7 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the section applies only to persons "seised, possessed of, or entitled to" lands "or any estate or interest therein," and though "executors and administrators" are separately mentioned, it is manifest from the context that the reference is only to "executors and administrators" who are possessed of or entitled to lands. In *Lippincott* v. *Smyth* (2) it was held that an equitable tenant for life, though he can sell under the section, cannot convey the legal estate.

(1) 63 L. J. (Ch.) 596; 71 L. T. 74. (2) (1860) 29 L. J. (Ch.) 520.

P. O. Lawrence, K.C., and *S. Dickinson*, for the vendor. First, as to the land, it is clear that the vendor has power to sell under Lord St. Leonards' Act. It is admitted that s. 16 confers the power subject to the qualification contained in s. 18. But s. 18 has no application to the present case; it applies only to devises, and here the estate passed partly by devise and partly by descent. The eldest son did not attain twenty-five until thirteen years after the death of the testator, and during that time there was no one who could have exercised the power under s. 18. The intention of the Act was that at the death of the testator the executor should be the person to sell if there was no devisee who could sell. *In re Wilson* (1) is a direct authority to that effect. Again, independently of statute, the vendor has, under the general law, power to sell the land as executrix by virtue of the charge of debts and legacies: *Wrigley* v. *Sykes* (2); *Sabin* v. *Heape* (3); *In re Tanqueray-Willaume and Landau* (4); *Robinson* v. *Lowater*. (5) The law has been so settled ever since the reign of Henry VII.: see the old case cited from 2 Sugden on Powers, 6th ed. 538, in the argument in *Wrigley* v. *Sykes*. (6)

Secondly, as to the easement, the vendor is, within s. 32 of the special Act, a person empowered by the Lands Clauses Acts to sell and convey or release lands, and therefore has the power to grant this easement. In s. 7 of the Lands Clauses Act, 1845, "executors and administrators" are enumerated among the persons empowered to sell and convey or release lands. Primâ facie executors and administrators are not persons who take an estate or interest in land, and it must therefore have been the intention of the Act to confer on them a power virtute officii. The expression "executors and administrators," as there used, ought not to be restricted to executors or administrators possessed of or entitled to land, but to be construed as including an executor having a power to sell land.

(1) 54 L. T. 600.
(2) (1856) 21 Beav. 337, 348.
(3) (1859) 27 Beav. 553.
(4) (1882) 20 Ch. D. 465, 480.
(5) (1854) 5 D. M. & G. 272.
(6) 21 Beav. 339.

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[KEKEWICH J. intimated that as to the easement he did not desire to hear a reply.]

Warrington, K.C., in reply. The questions as to the power under the statute and the power under the general law are in truth one, for the Act was passed in order to give statutory effect to the existing law. It is clear upon the authorities that, where there is a devise in fee of land charged with debts, the devisee is the proper person to sell. The doctrine of implied power in the executor "certainly does not apply to a case where the estate is devised to others or to another, charged with certain payments of debts or legacies: there that money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person and the only person that can make a legal title": per Lord Cranworth L.C. in *Colyer* v. *Finch*. (1) [He referred also to *Corser* v. *Cartwright*. (2)]

KEKEWICH J. There are two questions for decision, and it is convenient to treat them separately. The executrix of William Sawrey Rawlinson has contracted to sell land, and the question is whether she can make a title to the purchaser. The will of the testator may for the purpose of this question be stated briefly. Appointment of executor; charge of debts and legacies; devise to the first son who should attain twenty-five in fee. That is the whole will so far as we are concerned with it. The question is whether the executor can sell the land charged with the debts and legacies. For some purposes it is immaterial whether legacies are charged, but I speak of a charge of debts and legacies because that is what exists here, and there is no occasion to distinguish between the two charges. It is argued that the executrix has a power to sell under the ordinary or common law quite independently of Lord St. Leonards' Act, and in reply Mr. Warrington has said that really the two questions are one. I do not wish to cast any doubt on the authorities which shew that where there is a charge of debts or of debts and legacies an executor can sell, and it necessarily follows that the executor selling

(1) (1856) 5 H. L. C. 905, 922.
(2) (1873) L. R. 8 Ch. 971; (1875) L. R. 7 H. L. 731, 737.

under such a charge can vest in the purchaser such estate as his testator had, so as to give to the purchaser the title which the testator was competent to give if he had chosen to devise. It is not necessary to refer in detail to the cases which have been cited, and which must be taken to have settled the law long ago. I will assume that there was, independently of the statute, a power of sale. But the question which arises for decision is whether there is under the statute a power of sale, and that point is, I think, not only open, but entirely new. The purport of the statute is to express in statutory form what judicial opinion had declared the law to be; and if the executrix here has a power of sale it is under s. 16 of the Act, which to some extent operates by reference to the preceding sections. Sect. 16 deals with the case where there is no devise of the land for the whole estate or interest of the testator. That is the case which I have here, and the executrix is selling by the exercise simply of a power, and not by virtue of any property of her own. So far as I am aware, there has been very little if any question as to the construction of s. 16; but difficulty arises on the construction of s. 18, which places a limit on the provisions of s. 16, as also of ss. 14 and 15, by providing that they are not to extend to a devise to any person or persons in fee or in tail charged with debts or legacies. Here the devise is to the first son who shall attain twenty-five in fee, and the argument is that, that being so, there is no room for the operation of s. 16, which is excluded by s. 18. I must consider what the obvious and admitted purpose of the Act was. It was to enable property which was charged with debts and legacies to be sold in any event, i.e., by the devisee if there was a devisee, by the executor if there was no devisee. That is the short effect of the Act. Under which clause does this case fall? There is here a devise to a person in fee, but it is a devise by way of executory or springing use. It is a devise to the first son who shall attain twenty-five. As I pointed out in the course of the argument, a person to take might have remained unascertained for twenty-five years. As it so happened, the son attained twenty-five about thirteen years after the testator's death. What happened in the meantime? Of course, there being no

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provision in the will, the estate descended to the heir. There was a devisee eventually, but at the testator's death there was no devise in operation. The result was that during the thirteen years there was no power in any devisee to sell, because there was no devisee; and on the other hand it was said that there was no power in the executrix to sell. That seems to me to contradict the purpose of the Act, and to be inconsistent with its provisions. The precise case has never arisen, but a case very like it arose in *In re Wilson*. (1) It was a devise in settlement to a tenant for life and persons in remainder. They might or might not—it is immaterial to consider—be able between them to dispose of the whole fee; but the learned judge held that a devise of that kind was not "a devise to any person or persons in fee or in tail"—in other words, not a devise within the meaning of s. 18. The devise there referred to does not mean a particular estate or a number of particular estates followed by a remainder in fee, nor does it mean anything else than a devise in fee or in tail to a single person or to a number of persons as joint tenants or tenants in common, and that construction seems to be in accordance with the intention of the Act that either the devisee or the executor is to have the power, and, if there is a disposition of the fee which does not enable the devisee to sell by placing the control of the whole legal fee in a person or persons, s. 16 of the Act applies, and s. 18 does not apply. The case before Chitty J. of *In re Rebbeck* (2) does not seem to me to bear directly on this point, though it is interesting as being decided under s. 18. On that my decision is that a devise to a man's first son attaining twenty-five is not "a devise to any person" in fee or in tail within the meaning of s. 18 of Lord St. Leonards' Act. An argument was raised on the next words in the section, "or for the testator's whole estate and interest," but I have no doubt that the meaning is that where the testator is not owner in fee, so long as he devises all he has, the section is to apply. There was, however, a further argument on the concluding words of the section, "nor shall they" (i.e., the preceding sections referred to) "affect the power of any such devisee or

(1) 54 L. T. 600. (2) 63 L. J. (Ch.) 596; 71 L. T. 74.

devisees to sell or mortgage as he or they may by law now do," and the argument is that even supposing the son who ultimately took was not a devisee in fee immediately under the will, still he became a devisee in fee when he attained twenty-five; and from that time forward he must have been capable of selling, because the statute says a devisee may sell, and care is taken to provide that the power of such a devisee shall not be affected. To my thinking, that is not the right interpretation. I think the section has reference to the point of time when the will comes into operation. That is the definite period of time at which it is to be ascertained whether the power is vested in the executor or the devisee. The words "any such devisee or devisees" mean devisees who take on the death of the testator, by virtue of his will, an estate in fee or in tail then devised to them. I see no reason for saying that if the executor has the power it can be taken away from him because the heir is displaced by the springing use, and the devisee takes the fee on attaining twenty-five. Therefore, on that first point I decide in favour of the vendor.

The second question is one of an entirely different character. The executrix besides contracting to sell land also contracted to sell an easement, the right to convey water, and the question is whether she can do that. It is not suggested that there is any common law power in her under the charge of debts or any power under Lord St. Leonards' Act to grant an easement. What is said is that under the special Act of the corporation (the Barrow-in-Furness Corporation Act, 1901) there is this power to grant an easement. Before the special Act was passed the parties entered into the agreement which has given rise to the present discussion, and by that agreement the executrix purported to sell and the corporation to buy this easement. By the 22nd section of the Act the agreement is made binding, and it has not been argued that that statutory confirmation does anything more than make it a binding agreement. The Act by s. 3 incorporates the Lands Clauses Act, and by s. 32 it says that persons empowered by the Lands Clauses Acts to sell and convey or release lands may, if they think fit, grant to the corporation an easement, and it is said

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that under that section the vendor can grant an easement to the corporation. It is quite clear that under the Lands Clauses Acts no railway company or other public body, simply having the powers of that Act, could purchase an easement at all, and that no person, even an owner in fee, could grant them an easement so as to give them a good title. What would happen if any owner in fee in consideration of a sum of money granted them an easement, I cannot say, but the railway company would, I apprehend, have no title at law to the land; and certainly it cannot be suggested that the Lands Clauses Act gives the slightest power to any limited owner—that is to say, an owner who is not an owner in fee—to grant an easement. I approach the Lands Clauses Act and the special Act from that point of view. I think I must deal with the two enactments each by itself. [His Lordship referred to the terms of s. 32 of the special Act, and continued:—] The vendor is not by the Lands Clauses Act empowered to sell, unless s. 7 of that Act gives her the power. If she is not one of the persons empowered by that section, then she is not a person empowered by s. 32 of the special Act to grant an easement. I must therefore turn to s. 7 of the Lands Clauses Act, 1845. It begins thus: "It shall be lawful for all parties, being seised, possessed of, or entitled to any such lands, or any estate or interest therein, to sell and convey or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose; and particularly it shall be lawful for all or any of the following parties so seised, possessed, or entitled as aforesaid so to sell, convey, or release; that is to say"—so that we find at the beginning of the section a description of the persons who are to sell, convey, or release, and to enter into all necessary agreements, followed by a particular enumeration, and in those particulars it is to be observed there is no extension of the class, but it is again limited to the class already referred to. Among the persons so enumerated are "trustees or feoffees in trust for charitable or other purposes, executors and administrators, and all parties for the time being entitled to the receipt of the rents and profits of any such lands." The argument is that executors

and administrators are not entitled to land, and that that shews, notwithstanding the strong language pointing in a contrary direction, that the Legislature did contemplate some persons selling who were not seised, possessed of, or entitled to land. But the answer is that land includes chattels real, and also an estate pur autre vie vested in an executor or administrator, and even an administrator may become entitled to land as the legal personal representative of a sole or surviving executor; so that we have a meaning which can be given to the words without going so far as to say that executors or administrators are within the section although they are not seised, possessed of, or entitled to land. Then, again, committees of lunatics and guardians of infants are persons specified in the section. They have no estate or interest of their own, but they are to bind those on whose behalf they act—the lunatic in the one case and the infant in the other—and care is taken to shew that that is to be the form of the agreement: they are to contract "on behalf of" the lunatic or infant as if they were under no disability. So that the enactment is guarded at all points, and in a case where there is no possible interest in the person empowered to act it is specified in what capacity he is to do so. The concluding words of the section are important: "And as to such trustees, executors, and administrators on behalf of their cestui que trusts, whether infants, issue unborn, lunatics, femes covert, or other persons, and that to the same extent as such cestui que trusts respectively could have exercised the same powers under the authority of this and the special Act if they had respectively been under no disability." The words "other persons" might possibly include creditors, legatees, and so forth; but I do not think the language points in that direction, and I think that construction is excluded by the following words. In order to apply those words to such a case as this, you must treat the creditor, legatee, or cestui que trust as being under disability. I think it would be an extravagant construction to hold that the Legislature gave this power to an executor or administrator having no estate or interest in the land. I hold therefore, on this part of the case, that the executrix is not competent to

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grant an easement. The result is that I decide the first point in favour of the vendor, and the second point in favour of the purchasers.

Solicitors: *Iliffe, Henley & Sweet, for C. F. Preston, Town Clerk, Barrow-in-Furness; Tylee & Co.*

C. C. M. D.

BYRNE J. 1902 *Dec.* 19.

In re CASTLEHOW. LAMONBY *v.* CARTER.

[1902 C. 3485.]

Will—Construction—Trust for Investment—Railway or other Public Company—American Company.

A testatrix, after empowering her trustees to postpone the sale or conversion of any part of her estate, declared that any money by her will directed to be invested should be invested in "any of the public funds, or in Government or real or leasehold securities, or upon the stocks, shares, or securities of any railway or other public company." Some time after her death two shares which she had held in an English steamship company were exchanged for preference and ordinary stock in an American steamship company which had taken over the business of the English company:—

Held, that the words "public company," when read in connection with the preceding words of the clause, must be confined to public companies in the United Kingdom, and consequently that the trustees were not authorized to retain the American preference and ordinary stock as an investment.

ADJOURNED SUMMONS.

This was an application by the trustees of the will of the late Miss Elizabeth Castlehow, which raised the question whether a direction to invest in the "stocks, shares, or securities of any railway or other public company" authorized the retention, as an investment, of preference and ordinary stock in an American steamship company.

The testatrix, who died in January, 1882, devised and bequeathed all her real and personal estate to her trustees upon trust for sale, conversion, and investment, and directed them to pay the income of her residuary estate, after providing for her

debts, various legacies, and annuities, to her daughter, the defendant Emily Carter, for life, and after her decease, upon trust for her children as therein mentioned, with divers gifts over in default of there being any children. The testatrix empowered her trustees to postpone the sale and conversion of any part of her estate for so long as they should think fit, and declared that any moneys thereby directed to be invested might be invested in the name of the trustees "in or upon any of the public funds, or in Government or real or leasehold securities, or upon the stocks, shares, or securities of any railway or other public company."

At the time of her death the testatrix was possessed of two 1000*l.* shares in the Oceanic Steam Navigation Company, Limited, better known as the White Star Line.

In the year 1902 the White Star Line was, with other steamship lines, taken over by an American company, the International Mercantile Marine Company, Limited, a company organized under the laws of the State of New Jersey, in the United States of America.

Early in December, 1902, the trustees of the will received in exchange for the two 1000*l.* White Star Line shares the sum of 8287*l.* 16*s.* 6*d.* cash, and 13,406*l.* 2*s.* 8*d.* 6 per cent. preference stock, and 6713*l.* 1*s.* 4*d.* ordinary stock, in the International Mercantile Marine Company, Limited. . .

The trustees now applied by originating summons for the direction of the Court whether they should sell or retain this preference and ordinary stock.

T. H. Carson, K.C., and *J. Gatey*, for the trustees.

Rowden, K.C., and *O. L. Clare*, for the tenant for life. These preference and ordinary shares are authorized investments within the wording of the investment clause: they are shares in a "public company." This American company is clearly a public company. The question of what is meant by a public company in an investment clause of this kind was considered in *In re Sharp* (1), where the words are the same as the words in this clause. The testatrix speaks only of public

(1) (1890) 45 Ch. D. 286.

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companies without, as is very usual, any limitation as to locality, or as to incorporation by special charter or by statute. The American law as to public companies is very similar to the English law. This American steamship company is what would certainly be called in both countries a "public company."

Levett, K.C., and *Christopher James*, for persons interested in remainder. The investment clause must be read as a whole, and the words "public companies" must be taken in connection with the preceding words, in order to arrive at the true meaning of the words in question. "Public funds" must refer to public funds of this country, and "Government" means the Government of the United Kingdom. "Real and leasehold securities" would certainly not authorize an investment in land in a foreign country; the clause as a whole refers only to securities in the United Kingdom. It would not be consistent to hold that the earlier portion of the clause refers to English securities, and that "public companies" at the end means any public companies, whether in England or elsewhere. In *Edwards* v. *Thompson* (1), where the words were "shares in any railway," the Court held that shares in railways within the United Kingdom only were authorized. For these reasons the trustees are not justified in retaining these American shares as an investment.

Rowden, K.C., in reply.

BYRNE J. This summons raises a very short point, though one not altogether free from difficulty. The testatrix here has declared that her trust funds may be invested in any of the public funds, or in Government or real or leasehold securities, or upon "the stocks, shares, or securities of any railway or other public company." She was possessed at her death of two shares in an English steamship company, which no longer exist, having recently been exchanged for preference and ordinary stock in an American company which has taken over the business and assets of the English company, and it has been argued that this preference and ordinary stock can be retained by the trustees, because it is said the trust funds can

(1) (1868) 38 L. J. (Ch.) 65.

be invested in this stock, as the words of this investment clause are wide enough to include companies in all parts of the world, if they can be properly called public companies, within some definition or other, and that this American company is a company which would be considered a public company if registered in England. The right way to construe this clause, as was done by those who argued against the propriety of this investment, is to read it as a whole, and to interpret the particular words in connection with their context. The will is one of an English testatrix, it is in all respects an English will, and where she speaks of the "public funds" or "Government" securities, I think she means the public funds of the United Kingdom and the securities of the British Government: so, too, when she refers to "real or leasehold securities," she cannot be taken as meaning securities which, though foreign, are somehow charged upon immovables; that would be an extravagant view of that expression. I think she was using the words in their most commonly accepted sense, as meaning real or leasehold property or mortgages in England or Ireland. Then we come to the particular words, "stocks, shares, and securities of any railway or public company," the word "public" being repeated. We all know what our own public companies are within the meaning of English law, but we do not know what are public companies under any other law: apart from information imparted by the evidence of professional experts, the Court has no knowledge of its own as to the constitution of these companies under American law. Reading these words, therefore, in connection with the preceding words of this clause, I think the testatrix must clearly have intended to confine these investments to shares in public companies in the United Kingdom; and for this reason I am of opinion that the trustees are not justified in retaining these preference and ordinary shares longer than is necessary to find out how they may best effect an advantageous sale of the same: they are not, in my opinion, an investment authorized by this clause.

Solicitors: *Harrison & Powell, for Little & Lamonby, Penrith.*

W. C. D

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1902
Dec. 11, 12.

In re REDGATE. MARSH *v.* REDGATE.

[1902 R. 1077.]

Real Estate—Equitable Limitations—Power of Appointment—Appointment upon Trust for Sale—Conversion.

The rule laid down in *Kenworthy* v. *Bate*, (1802) 6 Ves. 793; 6 R. R. 46, that a power to appoint land is well exercised by an appointment to trustees upon trust for sale, applied to a case where the limitations were equitable and trustees were directed to convey the property to such child or children, and "for such estate or estates, manner and form" as the donee of the power should appoint.

By indentures of lease and release dated respectively December 25 and 26, 1834, certain hereditaments and messuages were limited unto and to the use of H. Attenborough and G. Eddowes, their heirs and assigns, upon trust as to one moiety thereof (after certain prior estates and interests which had long since determined) to "convey and assure the same unto such one or more child or children or issue of the body of the said Elizabeth Redgate, and for such estate or estates, manner and form as the said Elizabeth Redgate shall, in and by her last will and testament in writing or any writing in the nature thereof duly executed and attested (notwithstanding her present or any future coverture), give, devise, or dispose of the same, and in default of such gift, devise, or disposition, then in trust to convey and assure the said moiety" as therein mentioned.

By her will dated May 17, 1868, Elizabeth Redgate bequeathed all her personal estate to John Ashwell the younger upon trust for conversion, and to apply the proceeds as therein mentioned, and under and by virtue of the power reserved to her by the deed of 1834 she appointed all and every her real estates and hereditaments, shares of real estates, personal estate and effects, and also any other over which she had any control, disposition, or power of appointment, unto the said John Ashwell the younger, his heirs and assigns,

upon trust to receive the rents thereof, and to hold the same upon trust for her two grandchildren, John William Redgate and Oliver Redgate, in equal moieties as and when they should respectively attain the age of twenty-one years; and if only one should attain that age, the whole to be in trust for such only grandchild absolutely. "And from and immediately after the youngest of my said grandchildren shall attain the age of twenty-one years, then I direct my said trustee, his executors or administrators, to forthwith dispose of my said real estate either together or in parcels" as therein mentioned, and that he should hold the proceeds thereof upon trust to divide the same equally between her said two grandchildren in equal shares. And she appointed the said John Ashwell the younger executor and trustee of her will.

Elizabeth Redgate died in 1873; John William Redgate attained twenty-one in October, 1881, and died intestate in January, 1887. Oliver Redgate attained twenty-one in February, 1884.

The real estate had not been sold, and a question now arose whether under the trust for sale contained in the will it had been converted into personalty as from the time when Oliver Redgate attained twenty-one.

Astbury, *K.C.*, and *E. Ford*, for the plaintiff, who claimed the property as personalty. The appointment of the property by the will of Elizabeth Redgate upon trust for sale effected a conversion of the land into personalty: *Kenworthy* v. *Bate* (1); Theobald on Wills, 5th ed. p. 227; *In re Paget.* (2) It makes no difference that this is an equitable interest whereas in all the authorities on the subject the limitations were legal. The donee of a power of appointment over land can direct that the appointee shall take the land as personalty, and he has the same power of conversion in equity. This appointment does not fail simply because Elizabeth Redgate has made it through the medium of a trustee. The legal estate follows the beneficial interest, and no difficulty arises from the fact that the legal estate is outstanding in the trustees of the deed.

(1) 6 Ves. 793; 6 R. R. 46. (2) [1898] 1 Ch. 290.

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Buckmaster, K.C., and *H. M. Humphry*, for Oliver Redgate, who claimed the whole property as real estate. The trust for sale was inoperative. Elizabeth Redgate had no power to clothe the trustee of her will with the legal estate, so she could not give him power to sell. Where a deed creating a power of appointment gives the donee power to convey the legal estate, the authorities shew that that carries a power to say how the property shall be dealt with, including power to direct a sale: *Kenworthy* v. *Bate* (1); *Cowx* v. *Foster*. (2) But where there is no power to convey the legal estate a trust for sale is practically inoperative. Elizabeth Redgate could not convey the legal estate to her trustee nor to a purchaser. The deed of 1834 only empowered her to appoint an equitable estate to the beneficiaries, and the legal estate would have to be conveyed afterwards by the trustees in whom it was vested by the deed. When real estate is legally vested in trustees upon trust for particular persons, the trustees cannot convey the legal estate to any persons other than their cestuis que trust. Therefore, the trustees of the deed could not convey the legal estate to the trustee of the will without the consent of the beneficiaries. In *In re Paget* (3) the appointor had power to appoint the legal estate. No case can be found in which the donee of a power of appointment of real estate has been held to be able to effect a conversion except where he has had power to bind the legal estate. The distinction between the effect of trusts for sale in cases where the legal estate is in the trustee and cases where it is not is shewn by *Biggs* v. *Peacock*. (4)

Astbury, K.C., in reply. A power to appoint real estate includes power to distribute it as personalty. The donee of this power could create a trust for sale, and the trustees of the deed would in equity be compelled to convey the legal estate as directed: *Thornton* v. *Bright* (5); Farwell on Powers, 2nd ed. p. 319; *Fowler* v. *Cohn*. (6)

(1) 6 Ves. 793; 6 R. R. 46.
(2) (1860) 1 J. & H. 30.
(3) [1898] 1 Ch. 290.
(4) (1882) 22 Ch. D. 284.
(5) (1836) 2 My. & Cr. 230, 250; 45 R. R. 36.
(6) (1856) 21 Beav. 360.

BUCKLEY J. In *Thwaytes* v. *Dye* (1) the limitations were legal, to the use of the settlor for life, remainder to his wife for life, remainder to such of his four children and in such shares and proportions as he by any writing should appoint. It was held that the donee of the power could not only limit the land to any of the children, but might charge the land with any rent-charge or sum of money for any of the children; that his power was not confined to naming the person who should take the land, but that he could give the person beneficially entitled a sum of money charged on the land. That was in 1688. In *Kenworthy* v. *Bate* (2) the limitations were to the use of Bartholomew Penny for life, and then to the use of such child or children of his as he should by will appoint. It was held that the power was well executed by a devise to trustees to sell and an appointment of the money produced by the sale. At the conclusion of the judgment Sir William Grant M.R. says (3): "Does not a power to give include a power to sell for the purpose of giving the money instead of the land?" In *Cowx* v. *Foster* (4) Page Wood V.-C. held that a limitation "to such uses upon and for such trusts, intents and purposes, and with, under, and subject to such powers, provisoes, and declarations" as William Grave by deed or will should appoint, "so only that every such appointment be made in favour of a child or children or other issue of him the said William Grave," was well executed in favour of the children by a devise by William Grave of the land upon trust to sell the same and apply the proceeds in payment of his debts, funeral and testamentary expenses, and then among his children in certain specified shares. And in *Fowler* v. *Cohn* (5), where the limitations again were legal, namely, to the use of such of the children of A. B. and their heirs "for such estate and estates by such parts and proportions and in such manner and form" as A. B. by deed should appoint, the power was held to authorize an appointment to trustees upon trust to sell and divide the produce between the objects of the power. Sir John Romilly M.R. there said (6): "I find it quite settled by the authorities, that

(1) (1688) 2 Vern. 80.
(2) 6 Ves. 793; 6 R. R. 46.
(3) Ibid. 797.
(4) 1 J. & H. 30.
(5) 21 Beav. 360.
(6) Ibid. 365.

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a general power of disposition of the whole property includes the power of sale." In all the cases, however, to which I have referred the limitations were legal limitations, whereas these are equitable. The deed of 1834 with which I have to deal leaves the legal estate in the trustees: the limitation is to the use of the trustees, followed by a trust of the rents of the property for a certain time, and then, upon the death of the survivor of the persons entitled under a previous gift, upon trust that they should "convey and assure the same unto such one or more child or children or issue of the body of the said Elizabeth Redgate, and for such estate or estates, manner and form as the said Elizabeth Redgate shall in and by her last will and testament in writing, or any writing in the nature thereof duly executed and attested (notwithstanding her present or any future coverture), give, devise, or dispose of the same." The argument is that that does not enable her to create a trust for sale and division of the proceeds. First, on the language of the deed. The exact words are that the trustees should convey and assure the same "for such estate or estates, manner and form" as Elizabeth Redgate shall appoint. It is impossible to give effect to the words "manner and form" except by contrasting them with the words "estate or estates." It seems to me that they include a power to do something else than give an estate to children: that she may give to a child in some manner and form an interest in the property which shall not be an estate in the property itself.

Secondly, and apart from the exact form of the language of the deed, is there any variance tending to shew an impossibility of conversion and distinguishing this case from *Kenworthy* v. *Bate*? (1) I should have thought that the inference was the other way. When the limitations are legal the appointee takes the legal estate by virtue of the language of the power, and you might suppose that the settlor intended that he should take the land as land. *Kenworthy* v. *Bate* (1) shews, however, that even in that case a direction to sell and a gift of the proceeds is a good exercise of the power. Under these limitations the original deed and the exercise of the power do not convey the legal estate under the Statute of Uses; there is a

(1) 6 Ves. 793; 6 R. R. 46.

trust to convey the legal estate. You are a step further off from the beneficiary getting the legal estate. Under *Kenworthy* v. *Bate* (1) he gets it by virtue of the limitations contained in the settlement itself. In this case he gets it through the execution of a trust to convey to him by the trustees in whom the legal estate is vested by the settlement. I should have thought that this was an a fortiori case in favour of the possibility of conversion and a trust for conversion followed by a gift of the proceeds.

Then I am told that this cannot be so in this case, because the trustees of the will have not got the legal estate and cannot effect a sale of the land, but must go to the original trustees in whom the legal estate is vested. I do not see that that creates any difficulty. If the trustee for sale executes the trust, he can carry out the sale and can call upon the trustees of the deed to convey the legal estate to the purchaser. The case is, I think, covered by the principle of *Kenworthy* v. *Bate* (1), and the trustees of the deed are bound, if called upon, to convey the legal estate in accordance with the appointment.

[His Lordship then dealt with the question of the construction of the will of Elizabeth Redgate, and held that the direction to convert extended to the land appointed under the power conferred by the settlement as well as to her own property; and that the will therefore operated as a conversion of the appointed realty into personalty.

The case then proceeded on another point, and evidence was adduced to shew that the property had been reconverted by the election of J. W. Redgate and Oliver Redgate. His Lordship held that before the death of J. W. Redgate in 1887 he and Oliver Redgate had elected to convert the property into real estate; and he made a declaration accordingly.]

Solicitors: *G. Featherstone Johnson, for Burton & Briggs, Nottingham; Gribble, Oddie, Sinclair & Johnson, for Johnstone & Williams, Nottingham.*

(1) 6 Ves. 793; 6 R. R. 46.

H. C. R.

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1902

Dec. 11, 16.

TOLLER *v.* SPIERS & POND, LIMITED.

[1902 T. 1657.]

Public Health—Factory—Escape from Fire—Two Factories in one House—Tenement Factory—Notice to construct Works—Separate Notices for each Factory—Owner's Right to enter on Occupier's Factory—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 14, *sub-ss.* 2, 3, 7; *ss.* 87, 149.

The plaintiff owned a building the whole of which up to and including the fourth floor, but with the exception of the second floor, formed one factory, and was leased to and occupied by the defendants. The second floor was not a factory. The fifth, sixth, and seventh floors formed another factory. Each of these factories produced its own motive power. The county council gave notice to the plaintiff to provide better means of escape from fire; an arbitration took place at which the defendants were not present, and an award was made to the effect that an additional staircase ought to be made starting at the level of the third floor and extending to the seventh floor, and communicating with each of the intermediate floors. The county council served notice on the plaintiff requiring him to construct the works. The notices and the award treated the building as a whole, and did not deal with the factories as separate factories.

In an action brought by the plaintiff for an injunction to restrain the defendants from hindering him in making the staircase:—

Held, that the factories were separate factories, and that the whole building was not a tenement factory inasmuch as the occupiers produced their own power, and the building was therefore not one "where mechanical power is supplied" within s. 149 of the Factory and Workshop Act of 1901; that there was nothing in the Act which gave the plaintiff any right to enter on one of the factories in order to construct works for the benefit of the other factory; the fact that the defendants were not present did not exempt them from being bound by the arbitration; but the notices and the award ought to have treated the factories as separate factories, and as this had not been done the proceedings were ineffectual, and the plaintiff was not entitled to enter upon the defendants' premises.

THE plaintiff was the owner of the City Mills Building, a large isolated structure situate in Upper Thames Street, and extending from that street on the north to the foreshore of the river Thames on the south. It was of great depth from north to south, of comparatively small width from east to west, and of such a height that no fire-escape could reach the fifth floor. The building consisted of a basement, a ground-floor, and seven upper floors. From the basement up to and including the

fourth floor (but with the exception of the second floor) it formed one factory within the Factory Acts, occupied by the defendants, Messrs. Spiers & Pond, Limited, under leases for terms of years, of which the earliest would expire in 1912; and the fifth, sixth, and seventh floors formed another factory, occupied by Messrs. Farwig & Co., packing-case makers, under leases which would expire in 1911. The occupiers of each factory produced their own motive power from engines worked on their premises. The only staircases in the building were at the extreme northern end, and the London County Council were advised that if a fire were to break out in the centre of the building the southern end might be cut off from the northern end, and, therefore, that it was necessary to have an alternative means of escape by a staircase at the southern end. The second floor was not a factory within the Factory Acts, and the occupier of it refused to permit the construction of a staircase through his premises. The plaintiff had, therefore, no power to interfere with the occupier of that floor, and a new staircase could not be carried down from top to bottom of the building. On December 13, 1900, the London County Council served on the plaintiff notice under the Factory and Workshop Act which was then in force to provide better means of escape from fire. An arbitration, at which the defendants were not present, took place between the council and the plaintiff, and resulted in an award of March 4, 1902. In the interval the Factory and Workshop Act of 1901 had been passed, and the award was made under that Act. The substance of the award was this: it found that the building as a whole was not provided with such means of escape in case of fire as could reasonably be required; that the building contained two factories, those of the defendants and Messrs. Farwig & Co.; and that the second floor was not a factory. It then found that certain staircases which had been proposed could not be reasonably required because the occupiers of the second floor did not consent; and further awarded that the notice which the council had served should be amended so as to include the construction at the southern end of the building of a staircase starting at the level of the third floor and extending to the seventh floor,

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communicating with each floor of the building intermediate between the third and the seventh floors. The award did not deal with the factories separately. Consequent upon that the council, on July 10, 1902, served an amended notice, reciting the award, shewing that it referred to the building as a whole, and requiring the construction of the staircase by November 10, 1902.

The defendants declined to allow the plaintiff to enter upon their premises to execute the works, and the plaintiff brought this action for an injunction to restrain them from hindering him in so doing.

Astbury, K.C., and *R. J. Parker*, for the plaintiff. Under s. 14, sub-s. 2, of the Factory and Workshop Act, 1901, the plaintiff is bound to construct the works required by the notice, and in order to carry them out he is authorized to enter upon the defendants' premises notwithstanding their leases. The dispute has been caused by the fact that the proposed staircase will serve two factories which are not equally unsafe; but it is submitted that neither of the occupiers of the factories can prevent the plaintiff from entering for the purpose of making it.

The Factory and Workshop Acts are now consolidated in the Act of 1901, and the decision in this case will depend upon the construction of that Act. The power to enter is given by s. 14, sub-s. 2. The words "means of escape" in that sub-section mean "such means" as can reasonably be required under the circumstances of each case: sub-s. 1. The power to enter in order to construct these works applies to the particular factory which is found to be unsafe, but it also applies to what is called a tenement factory. This is a tenement factory, and by s. 14, sub-s. 7, the whole building must be deemed to be one factory. Sect. 149 defines a tenement factory as "a factory, where mechanical power is supplied to different parts of the same building occupied by different persons for the purpose of any manufacturing process or handicraft, in such manner that those parts constitute in law separate factories; and, for the purposes of the provisions of this Act with respect to tenement

factories, all buildings situate within the same close or curtilage shall be treated as one building." That definition does not mean that the motive power must be supplied from a common source, for in that case it would be all one factory, not a collection of separate factories. It covers a building like this, which includes two factories both of which supply their own power.

[BUCKLEY J. In every factory power of some sort is used. That language would not have been used if it was not intended to refer to a supply from a common source.]

The second floor is not a factory within s. 14, sub-s. 2, because a sufficient number of workmen are not employed in it; but the limit of numbers does not apply for the purpose of ascertaining whether a building is a tenement factory: sect. 149.

[*Buckmaster, K.C.* Sect. 87 is opposed to that construction.]

By s. 161 notices affixed in a factory under Acts which have been repealed are to be deemed to have been affixed under this Act; so the original notice in the present case is to be deemed to have been given under this Act. The proceedings, therefore, have been regular, and the defendants are bound by the award. If they are not bound by that, they are bound by the second notice. Under s. 14, sub-s. 2, if the work is reasonably required, within sub-s. 1 the owner is obliged to do the work, and the occupier cannot hinder him. The machinery provided by the Act for ascertaining what is reasonable is an arbitration and an award. These conditions have been complied with, and in point of fact the evidence shews that the requirement is reasonable, and that the proposed staircase is necessary for the protection of the defendants as well as for Messrs. Farwig & Co.

Even if this is not a tenement factory, the defendants are nevertheless bound to allow us to carry out the work. The only question for the Court is whether the proposed staircase is reasonably necessary—i.e., whether so much of it as relates to the defendants' premises is reasonably necessary for their protection—and the fact that it will also be useful to Farwig & Co. is irrelevant: *London County Council* v.

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Brass (1); *London County Council* v. *Lewis*. (2) The Act does not say that the means of escape must be constructed wholly in the factory to be provided with them.

Messrs. Farwig & Co. support us, and the defendants are in danger also.

[BUCKLEY J. The assent of one occupier does not enlarge the statutory rights against another.]

The present position is that we are liable to heavy penalties although we have done our best.

Buckmaster, K.C., and *Clauson*, for the defendants. Before the plaintiff becomes entitled to enter on our premises certain conditions precedent must be complied with. The county council must consider whether a particular factory is provided with reasonable means of escape, and must serve notice on the owner of that factory. They cannot lump together a number of factories and serve a notice referring, not to one factory, but to the whole series of factories. For the purposes of this Act the factories of the defendants and Messrs. Farwig & Co. are separate and independent, and they ought to have been so treated. The county council have not ascertained whether each of these factories is provided with reasonable means of escape, as they were required to do by s. 14, sub-s. 2. Where a building is in part a factory and in part not a factory, the owner cannot enter on the part which is not a factory, although the whole building is held by him: *London County Council* v. *Brass*. (1) Nor can he enter on one factory to provide means of escape for another, even though both belong to him: *London County Council* v. *Lewis*. (2) Here the plaintiff cannot touch the second floor, and in these proceedings he cannot enter on our premises. The Act gives him no power to interfere with us for the benefit of another factory, nor without a proper notice addressed to our particular factory. The consent of Messrs. Farwig & Co. does not affect us. An interference by the plaintiff under this notice would be a breach of the covenant for quiet enjoyment, for which compensation could be claimed.

The award is only "binding on the parties thereto" (s. 14,

(1) (1901) 17 Times L. R. 504. (2) (1900) 69 L. J. (Q.B.) 277.

sub-s. 3), and does not affect us. Therefore, we are not bound to permit the plaintiff to enter. The owner cannot enter upon premises belonging to a person who was not a party to the arbitration: *London County Council* v. *Lewis*. (1)

[They were stopped on the question whether the whole building constituted a tenement factory.]

Astbury, K.C., in reply. Our evidence has not been contradicted. So it is now admitted that the staircase is reasonably required.

[BUCKLEY J. The evidence only shews that part of it is necessary for the defendants' factory.]

That is sufficient; the intention of the parties is irrelevant. If it is held that the notices are irregular because they do not distinguish between the factories, the only result will be that the county council will serve fresh notices on us.

[BUCKLEY J. But they would then have to treat the factories separately throughout the proceedings.]

The fact that the new staircase will be necessary for Messrs. Farwig & Co. does not make it unnecessary for the defendants. That the award refers to both factories together is immaterial. The county council have ascertained that the two factories are not provided with proper means of escape. They have served notices, and there is nothing in the Act which says that a separate notice must be served in respect of each factory when both belong to the same owner and one staircase will do for both, although one part of it serves one factory and another part serves the other. The only notice is to be given to the owner, and he can waive any irregularity in it, and accept it as notice in respect of each factory separately.

Cur. adv. vult.

Dec. 16. BUCKLEY J. stated the facts, and continued:—The defendants say that the plaintiff has not the right, adversely to them, to enter upon their demised premises to execute the works. The plaintiff asserts that he has. This is the question to be determined. It is clear that the plaintiff has no such

(1) 69 L. J. (Q.B.) 277.

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right unless the statute gives it to him. Thus, the question is whether the statute gives it to him.

Upon this the first material inquiry is whether the two factories, that of Messrs. Spiers & Pond, which I will call factory A, and that of Messrs. Farwig & Co., which I will call factory B, constitute what the Factory and Workshop Act, 1901, calls a "tenement factory" so as to be deemed one factory. By s. 14, sub-s. 7, of that Act it is provided that for the purposes of that section the whole of a tenement factory shall be deemed to be one factory. Sect. 149 defines a tenement factory. I do not read the definition at length. To ascertain whether these factories A and B are a tenement factory or not, I must first see whether they are in one building. The answer is in the affirmative. Then is each of them in law a separate factory? I think it is. A factory textile or non-textile is defined in the earlier part of the same section, and means premises wherein mechanical power is used for some purpose as there defined. But is this a factory where mechanical power is "supplied to different parts of the same building occupied by different persons?" I think plainly it is not. Those words obviously do not mean simply a factory where mechanical power is used. That is already involved in the word "factory." They point, not to the user, but to the "supply" of mechanical power to different parts of the same building—a supply, for instance, by the occupier of the one factory to the occupier of the other factory, or a supply to both from some external source by a third person, including and perhaps meaning the person of whom the tenement is held. The owner of a tenement factory, whether he is an occupier or not, is responsible for many matters relating to the factory instead of the occupier, including matters relating to machinery: see s. 87. Every factory is one which uses mechanical power, and the words "where mechanical power is supplied, &c," cannot mean to repeat something which is already imported by the use of the word "factory." Moreover, the verb is not "used," but "supplied," meaning, I think, "taken by the factory occupier from a source of supply external to himself." The factories A and B in the present case are, so

to speak, self-contained factories. Each factory occupier produces his own mechanical power by arrangements within his own factory. Factories A and B are, in my judgment, for all purposes of the Act separate factories, and do not constitute a tenement factory. It results that the council here have to do with two separate factories.

I look next to see what powers the statute gives to the owner of factory A as against the occupier of factory A to require the latter to allow the former to enter upon his premises to do works. The only right is under s. 14, sub-s. 2, of the Act of 1901. Let me take four cases, assuming that in each case there is a common owner of A and B.

First, suppose that A is not a factory at all, but that B, the factory above, is in danger of fire, and that the council think it reasonably necessary to make a staircase through A for the protection of B. It is plain that the owner has no power to do anything of the kind as against the occupier of A. In that case A is not within the Act at all. This has in fact been decided in *London County Council* v. *Lewis*. (1) It is exactly what has here occurred with reference to the second floor of this building.

Secondly, suppose that A is a factory, but is effectually provided so far as it is concerned with means of escape in case of fire, but that B is not so provided. Is there anything in the Act to enable the owner of factory A to enter as against the occupier of factory A to do works for the benefit of factory B? In my opinion there is not. This seems to be involved in *London County Council* v. *Brass* (2), although the report is not very clear. The effect of s. 14, sub-s. 2, is, in my judgment, that the owner of the factory which is in danger can be required to carry out works for the protection of the factory which is in danger, and that the owner of that factory has power to execute works so reasonably required, "notwithstanding any agreement with the occupier" of that factory. The statute gives him, as against his tenant, the right to enter and do works required in respect of the property included in the demise, but it gives him no other rights. Whether the works are "reasonably required"

(1) 69 L. J. (Q.B.) 277. (2) 17 Times L. R. 501.

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or not is to be determined in manner directed by the statute. I may pause here to say that a point was raised that the occupier was not present when the award was made, and is therefore not bound by the award. This, I think, is a false point. The machinery of the Act is to provide statutory means for determining what are the means of escape reasonably required. That machinery includes an arbitration between the council and the owner. When the machinery of the Act has been honestly used, and the means of escape reasonably required has been thus ascertained, the statute gives to the owner as against the occupier the right to enter and do those works.

But, thirdly, suppose both factories are unsafe, has the owner of both as against the occupier of one of them, e.g., factory A, any right to enter and execute works for the protection of factory B, by reason of the fact (which is here assumed) that works are also reasonably required for factory A? I think not. The only right as against the occupier of factory A is to enter and do works for the protection of factory A. The existence of that right does not carry with it the further right at the same time to do further or other or any works for the benefit of factory B.

Lastly, suppose that works which are (or to a large extent are) the same for both are reasonably required for the benefit of both A and B, is the owner entitled to enter on the occupier of A to execute a work which will be available for both by opening an escape for persons in A through B, and for persons in B through A? I think not. The only operation of the statute is that it is no trespass for the owner of A to enter against the occupier of A to do works for the benefit of A. It gives no power to open through A an exit for persons in B. Those persons in passing through A would be trespassers. The statute does not render this not a trespass.

With these observations upon the scope of the Act, I pass to that which the London County Council have done. [His Lordship referred to the notices and the award.] Upon the question whether the staircase in question is reasonably required for the protection of factories A and B, or one and which of them, the relevant words of the award are these: "I

find that a suitable staircase [describing it] communicating with each floor of the building, intermediate between the third and seventh, would materially diminish the risk of injury or loss of life in case of a fire breaking out in any of the upper floors of the building, and would be reasonably required."

It seems to me that in the acts thus done the council can only have proceeded legally under the Act if the fact were (as in my judgment it is not) that the building in question is a tenement factory, and is therefore to be deemed one factory. They have never taken upon themselves to ascertain, and have never given any notice based upon any conclusion as to what is necessary for the protection of factory A as a separate factory. Treating A and B together, they arrive at certain conclusions with regard to a work which will benefit both, and will do so by opening to each a means of escape through the premises of the other. What conclusion they would have arrived at if they had considered A alone, or upon the footing that they could not give each a right of escape through the premises of the other, I find myself quite unable to say. They might, for instance, have recommended simply as regards factory A that the skids or floor openings between the third and fourth floors should be closed and a staircase constructed at the southern end, giving communication between the third and fourth floors. In the case of a fire in either of those two floors there would then have been the means to reach the staircase at the northern end by going up or down, as the case might be, to the other of them, and passing to the northern end of the building. I only give this as an illustration. The point is that the works reasonably required for factory A, if that factory alone had to be considered, have not been taken into consideration by the council, and they have not given any notice to do works other than works for the benefit of factories A and B, considered jointly, and the works specified are works which would give to each a means of escape through the premises of the other. Under s. 14, sub-s. 2, of the Act of 1901 it was the duty of the council, I think, to serve on the owner of factory A a notice in writing specifying the measures necessary for providing means of escape reasonably required

BUCKLEY J. 1902 TOLLER v. SPIERS & POND, LIMITED.

for persons in factory A. The owner as against the occupier of factory A would have been entitled to enter and do those works. But, as it seems to me, the proceedings which have been taken in respect of the two factories jointly have been wrongly taken, and are ineffectual, and the works required are for the reasons I have stated inadmissible. To support this action it is necessary to find in the Act a provision that two factories which have a common owner shall for the purposes of s. 14 be deemed to be one factory. There is no such provision in the Act.

I have thus decided simply the question of law (an important one, no doubt) which arises upon the construction of this statute. What has been the particular cause of friction between the plaintiff and defendants I do not know. It is not material to anything which I have to decide. I think that the plaintiff is wrong in contending that he has against the defendants a legal right to enter and do these works. This is the whole question involved in the litigation, and I dismiss the action with costs.

Solicitors: *Peake, Bird, Collins & Co.; Linklater, Addison, Brown & Jones.*

H. C. R.

SWINFEN EADY J.

1902

Dec. 3.

In re SMITH'S SETTLEMENT. WILKINS *v.* SMITH.

[1902 S. 1947.]

Settlement—Construction—Ultimate Trust—Wife's Next of Kin—Die "without ever having been married"—Children—Weekly Notes—Citation.

Where a settlement made on the marriage of a spinster contains trusts for her children attaining twenty-one or marrying, an ultimate trust, in default of such children, and in the event of the wife predeceasing the husband, for her statutory next of kin as if she had died intestate and "without ever having been married" primâ facie excludes children.

Clarke v. *Colls*, (1861) 9 H. L. C. 601, 612, followed.

No general rule to the contrary is laid down in *Wilson* v. *Atkinson*, (1864) 4 D. J. & S. 455.

Emmins v. *Bradford*, (1880) 13 Ch. D. 493, followed; *In re Ball's Trust*, (1879) 11 Ch. D. 270, *Upton* v. *Brown*, (1879) 12 Ch. D. 872, *Re Watson's Trusts*, (1886) 55 L. T. 316, *Stoddart* v. *Saville*, [1894] 1 Ch. 480, and *In re Mare*, [1902] 2 Ch. 112, not followed on this point.

Except on points of practice, the *Weekly Notes* should only be cited as interim reports of cases during the period required for their publication in the *Law Reports*.

Originating Summons.

By a marriage settlement dated February 15, 1882, and made between the intended wife, then a spinster, of the first part, the intended husband of the second part, and trustees of the third part, certain personalty belonging to the wife was settled upon trust for the wife for life for her separate use without power of anticipation, and after her decease upon trust for the husband for life, and after the decease of the survivor upon trust for such of the wife's children or issue born during the lives of the wife and husband or the survivor of them, or within twenty-one years after the death of the survivor, as the wife and husband should by deed jointly appoint, and in default of appointment as the survivor should in like manner or by will (and as to the wife notwithstanding any future succeeding coverture) appoint (but so that no child or issue should take an absolute interest under any appointment unless being a male

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1902

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he should attain the age of twenty-one years, or being a female she should attain that age or marry), and in default of appointment upon trust for all the wife's children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares as tenants in common, with the usual hotchpot clause. And it was provided that if there should be no child of the wife who being a son should attain the age of twenty-one years, or being a daughter should attain that age or marry, then, subject to the trusts thereinbefore declared, the trustees should stand possessed of the trust funds upon trust, if the wife survived the husband, for herself, her executors, administrators, and assigns, but if she died in his lifetime, then upon trust for her testamentary appointees, and in default of appointment upon trust for such persons of the wife's blood and kindred as under the statutes for the distribution of the estates of intestates would have been her next of kin in case she had died intestate and "without ever having been married."

The wife died on June 6, 1885, intestate, leaving her husband surviving.

There were three children of the marriage, all of whom died infants and unmarried, the first during the wife's lifetime, the second on June 10, 1885, i.e., a few days after her death, and the third on October 3, 1901, after the death of the husband, who died on December 28, 1899.

No appointment of the trust funds having been made, this summons was issued to determine whether they had devolved on the children who survived the wife, or whether they had devolved on the wife's statutory next of kin excluding children.

Frederic Thompson, for the surviving trustee.

Northcote, for a person representing the estates of the children. The words "without ever having been married" in a marriage settlement exclude the husband but not the children: *Wilson* v. *Atkinson*. (1) This has been treated as a binding rule in *In re Ball's Trust* (2) and *Upton* v. *Brown*. (3) In *Emmins* v.

(1) 4 D. J. & S. 455. (2) 11 Ch. D. 270.
(3) 12 Ch. D. 872, 878.

Bradford (1) Jessel M.R. held that *Wilson* v. *Atkinson* (2) laid down no such general rule, but it was again recognised in *Re Watson's Trusts* (3), *In re Arden's Settlement* (4), *Stoddart* v. *Saville* (5), *In re Forbes* (6), and *In re Mare.* (7)

[SWINFEN EADY J. Except on points of practice the *Weekly Notes* should only be cited as interim reports of cases during the period required for their publication in the *Law Reports.* (8)]

Emmins v. *Bradford* (1) has been followed by the Irish Courts in *Hardman* v. *Maffett* (9) and *In re Deane's Trusts* (10), but those decisions do not bind this Court.

It is admitted by conveyancers that the present form fails to exclude children, or the husband as their next of kin, and other forms are now suggested: 2 Key and Elphinstone, 7th ed. p. 486; Wolstenholme's Forms, 6th ed. p. 105.

Rolt, for the wife's next of kin excluding children. *Wilson* v. *Atkinson* (2) turned on the construction of a particular instrument, and laid down no general rule. There was no prior trust for children, as in the present case. *Upton* v. *Brown* (11), *In re Mare* (7), and the two cases in the *Weekly Notes,* i.e., the only cases recognising the supposed rule, in which there was a prior trust for children, and a gift over in default of children taking a vested interest, were merely decided on a mistaken view of *Wilson* v. *Atkinson.* (2) *Emmins* v. *Bradford* (1) is the only authority on a settlement in which the exact words "without ever having been married" were actually used; but in *Clarke* v. *Colls* (12), where there was a gift to the wife's statutory next of kin as if she had died "unmarried," it was held that if "unmarried" were construed "without ever having been married" the children, and not

(1) 13 Ch. D. 493, 498.
(2) 4 D. J. & S. 455.
(3) 55 L. T. 316.
(4) W. N. (1890) 204.
(5) [1894] 1 Ch. 480.
(6) W. N. (1899) 6 (4).
(7) [1902] 2 Ch. 112.
(8) Vide observations in *Newson* v. *Pender,* (1884) 27 Ch. D. 50, n.; *Bridgend Gas and Water Co.* v. *Dunraven,* (1885) 31 Ch. D. 221; *Pooley's Trustee* v. *Whetham,* (1886) 33 Ch. D. 77; *Birmingham and District Land Co.* v. *London and North Western Ry. Co.,* (1886) 34 Ch. D. 273; *In re Woodin,* [1895] 2 Ch. 318; *In re Loveridge,* [1902] 2 Ch. 865.
(9) (1884) 13 L. R. Ir. 499.
(10) [1900] 1 I. R. 332.
(11) 12 Ch. D. 872, 878.
(12) 9 H. L. C. 601, 612.

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merely the husband, would be excluded. The older conveyancers considered the words sufficient to exclude the children: 3 Davidson, pt. 1, 3rd ed. p. 190. Any other construction renders them purely superfluous, as the husband, not being able to take under a gift to the wife's statutory next of kin, requires no further exclusion.

SWINFEN EADY J., after stating the facts and pointing out that if the children who survived the wife took under the ultimate trust, the share of the child who predeceased the husband would have devolved on the husband, continued:—Now, on the language of this instrument itself, apart from authority, I have no difficulty whatever in coming to a conclusion. The language appears to me to be absolutely clear and as free as possible from ambiguity. In default of children taking a vested interest the property is to go to a class ascertained under the Statutes of Distribution, on the hypothesis that the wife had died intestate "and without ever having been married." Those words clearly exclude children, because if the wife had not been married she could not have had any lawful issue. It seems to me, therefore, that the words must have that interpretation, unless I am bound by a rule of construction to say that in this settlement, being a settlement on marriage, the words "without ever having been married" have a fixed and definite technical meaning different from their ordinary and natural signification. If there is any such technical rule of construction, I must give effect to it; but if I am not bound by any such rule, then I have no difficulty whatever in arriving at the true construction of the instrument in question.

Now the rule is said to have been established by *Wilson* v. *Atkinson* (1), where the ultimate trust, in the event of the wife Jane Wilson dying in her husband's lifetime, was "for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said Jane Wilson, if she had died possessed thereof intestate and without having been married, such

(1) 4 D. J. & S. 455.

persons, if more than one, to take as tenants in common and in the shares in which they would have taken under the same statutes." The settlement in that case was the settlement of a widow who had an illegitimate daughter, and the settlement contained a provision that the illegitimate daughter should for the purpose of that trust be deemed to be the lawful child of the said Jane Wilson. Knight Bruce L.J. says (1): "The words 'and without having been married' are the part of that settlement upon which the difficulty arises; and the point which we have to determine is, whether these words ought to be read as signifying 'without having been married to any one,' or 'without leaving a husband living at her death,' or lastly, 'without having been married to her then intended husband.' The context forbids the first of these constructions; and this I think, even independently of the following declaration, viz., that the appellant should for the purposes of the preceding trust, which was for the next of kin, be deemed to be the lawful child of Jane Atkinson. (2) But this latter clause, in my judgment, constitutes an effectual and binding provision to the benefit of which the appellant is entitled. Both provisions read together certainly give the appellant a right to the fund, and she appears to me accordingly entitled to succeed." In other words, he does not purport to lay down any general rule of construction, that in a marriage settlement the words "without having been married" are always to receive one fixed definite construction, and certainly does not lay down that those words, or words like them in every marriage settlement, no matter what the context, and no matter whether it provides for the issue of the intended marriage or not, are to receive this certain definite construction. In *Wilson* v. *Atkinson* (3) the settlement contained no express provisions for children or issue. Then Turner L.J., who agrees with Knight Bruce L.J. in reversing the decision of Romilly M.R., says (4): "This trust cannot be construed without taking into account the declaration immediately following; and there would be no meaning in that declaration, which is to the effect that the appellant for the

(1) 4 D. J. & S. 460.
(2) *Sic.*
(3) 4 D. J. & S. 455.
(4) Ibid. 461.

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purposes of the trust for next of kin should be deemed a lawful child, if lawful children themselves could not have taken under that trust. That declaration must therefore, being taken in connection with the trust for the next of kin, be considered to explain the latter to refer to children as well as other next of kin. Even if it be necessary to construe the terms of the trust for the next of kin independently and without qualifying them by the subsequent declaration, still in my judgment the trust for the next of kin ought not to be so construed as to exclude children." So that both the Lords Justices decide the case upon the context of that particular instrument, and I do not understand either of them as laying down any general rule for the construction of all marriage settlements irrespective of the nature of their provisions.

Now, I should arrive at that conclusion on the consideration of that case alone; but if there had been subsequent decisions which compelled me to take a different view of *Wilson* v. *Atkinson* (1), I should be bound by them. But the decisions are not uniform.

In *In re Ball's Trust* (2) and *Upton* v. *Brown* (3) Fry J. felt himself constrained to decide according to the supposed rule of *Wilson* v. *Atkinson* (1); but almost immediately afterwards in *Emmins* v. *Bradford* (4) Jessel M.R. felt himself at liberty to come to an entirely different conclusion. In *In re Ball's Trust* (2) the settlement contained no provision for the issue of the marriage. It was not, as in the present case, a gift in default of children taking a vested interest. Again, in *Upton* v. *Brown* (3), where the claimant was the son of the former marriage, Fry J. gave (inter alia) the following reasons for his judgment (5): "Moreover, if I were to hold that this child is excluded, I must equally have held that his children were excluded if he had married and had died under twenty-one leaving children, and I must equally have excluded children of a third marriage of the mother, for whom the settlement makes no express provision." This latter reason which seems to have

(1) 4 D. J. & S. 455.
(2) 11 Ch. D. 270.
(3) 12 Ch. D. 872.
(4) 13 Ch. D. 493, 498.
(5) 12 Ch. D. 878.

influenced the learned judge I am unable to appreciate, because there could have been no third marriage unless the mother survived her husband, in which case the fund became hers absolutely. Of course the second marriage might have been dissolved, leaving the wife at liberty to contract a third marriage, but the learned judge was not, as I think, referring to this contingency.

In *Emmins* v. *Bradford* (1)—a very clear and distinct authority the other way—Jessel M.R. said: "In the present case I rest my decision upon this, that the words are free from ambiguity, and that there is no context whatever to control them." *Emmins* v. *Bradford* (1) was a very strong decision, because the effect of it was to exclude living children of a former marriage; and Jessel M.R., after considering the meaning of the word "unmarried," and referring to *Clarke* v. *Colls* (2), discussed *Wilson* v. *Atkinson* (3) and Fry J.'s decisions upon that case, and said "until, therefore, a higher Court lays down some new general principle of construction, I shall not interfere with unambiguous words." It cannot, therefore, be said that the decisions following *Wilson* v. *Atkinson* (3) are uniform.

Now, *Emmins* v. *Bradford* (1) has been twice followed in Ireland in the cases referred to; but in the English case of *Stoddart* v. *Saville* (4) Chitty J. followed Fry J. It will be observed that in *Stoddart* v. *Saville* (4) there was no trust for the issue of the marriage. The lady had left one child of the marriage, and the trust was not, as in the present case, a trust in default of a child attaining a vested interest.

In addition to the cases in the *Weekly Notes* to which reference has been made, there is the case of *In re Mare* (5), in which Kekewich J. considered himself bound by *Wilson* v. *Atkinson* (3) as governing the whole question, and said it was a clear decision of the Court of Appeal covering the exact case. The authorities, therefore, are certainly conflicting.

As regards the text-writers, it has been pointed out that

(1) 13 Ch. D. 493, 498.
(2) 9 H. L. C. 601, 612.
(3) 4 D. J. & S. 455.
(4) [1894] 1 Ch. 480.
(5) [1902] 2 Ch. 112.

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Mr. Davidson's view is that the present clause excludes the husband and children. Mr. Wolstenholme's view is that the object of all conveyancers is to exclude the husband, not only in his own right, but also as next of kin of the children; but that the words in question do not effect that object.

Now, in that state of the authorities, the decision in *Clarke* v. *Colls* (1) seems to me of considerable importance, because, if there is a conflict of authority, certainly any rule there laid down would prevail. In *Clarke* v. *Colls* (1) the actual words were "in case" the wife "had died possessed thereof intestate and unmarried," and the contest was as to the meaning of the word "unmarried." Lord Cranworth says: "What is the meaning of the word 'unmarried'? It may, without any violence to language, mean either 'without ever having been married,'"—those are the precise words in this case—"or 'not having a husband living at her death.' If the former construction be adopted,"—that is to say, if the word means "without ever having been married"—"then, if the wife should survive her husband, and afterwards marry and have children, her collateral relatives would take the fund to the exclusion of her own issue." In other words, he considers that the words "without ever having been married" in a marriage settlement would exclude the issue, which they obviously do according to their ordinary meaning.

In *Re Watson's Trusts* (2), which turned on the construction of a will, Chitty J. came to the conclusion that the words "without having ever been married" were clear and unambiguous, and that effect must be given to them by directing that the lineal descendant was excluded in favour of collateral next of kin. Chitty J. dealt with the difference between a will and settlement in this way. After referring to the cases which have been cited to-day, he says: "Those cases were all cases upon the construction of marriage settlements where the Court is guided, in interpreting a gift, by the existence of a presumption that the parties intended to benefit the issue."

Now, where there is a settlement dealing in terms with a

(1) 9 H. L. C. 601, 612. (2) 55 L. T. 316.

certain class of issue, that is, issue for whom it is intended to provide, such as sons at twenty-one, daughters at twenty-one or marriage, with a gift over in default of such issue, it seems very difficult to say that there is nevertheless an intention to provide for issue who do not take a vested interest under the settlement. There is also this further observation to be made. It is said that the intention of this clause is to exclude the husband, and that a particular interpretation has been put upon it with that object. But if that be so, it seems that the very interpretation so put upon it defeats the object, and does not give effect to it; because the object being to exclude the husband both in his own right and in his children's right, the construction contended for on behalf of the children would let in instead of excluding the husband in the only event I am dealing with, namely, where there are children who fail to take a vested interest. It seems to me a case in which, if I were to decide that the children took, I should be departing from the ordinary and natural meaning of the words, with the view of giving effect to a supposed intention, and at the very same time defeating that intention by enabling the property to devolve upon the husband, the very person whom it was the object of the settlement to exclude.

Under those circumstances I am of opinion that I am not in the present state of the authorities compelled to interpret the words of this settlement in any other than their ordinary natural meaning; and accordingly I decide that the issue of the marriage are excluded by the words "without ever having been married." I may also observe that the argument that the husband only is excluded by the words in question gives no effect to these words, as the husband is already excluded by the preceding words.

There will be a declaration accordingly, and the costs will come out of the fund.

Solicitors: *Field, Roscoe & Co., for Griffiths, Ryland & Co., Cheltenham.*

G. R. A.

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Dec. 4

In re BARLOW'S CONTRACT.

[1902 B. 2902.]

Settled Land—Sale—Life Estate—Partial Merger—Continuance of Powers —Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 50.

Although a life tenant of real estate has assigned a share of his life estate to a remainderman, so as to merge that share, he can still make a title to the entire settled estate with the consent of his assignee.

Observations of Chitty L.J. in *In re Mundy and Roper's Contract*, [1899] 1 Ch. 275, 296, considered.

Vendor and Purchaser Summons.

This summons was issued by the vendor to determine whether she could make a title to settled real estate as life tenant, notwithstanding certain transactions which the purchasers contended had vested two undivided third shares of her life estate in the persons entitled to those shares in remainder so as to merge them. The vendor, while denying the effect of these transactions, which depended on the construction of several complicated documents, contended as a preliminary point that, even if the shares had merged, she could still make a title to the entirety with the consent of her alleged assignees, and without deducing any title to the remainder.

The preliminary point was argued on the assumption that the shares had merged.

R. J. Parker, for the vendor. The vendor can make a title with the consent of her alleged assignees: Settled Land Act, 1882, s. 50. This was so in the case of a power appendant before the Act: *Alexander* v. *Mills*. (1) It is suggested, in reliance on a dictum of Chitty L.J. in *In re Mundy and Roper's Contract* (2), that this rule does not apply where part of the life estate is merged. But the dictum is confined to a merger of the entirety, and it is based on the assumption that the settlement has come to an end, so that there is no reason

(1) (1870) L. R. 6 Ch. 124. (2) [1899] 1 Ch. 275, 296.

for the powers to continue. This reasoning is clearly inapplicable to a partial merger. Here the entire estate is still settled land, and the life tenant is life tenant thereof within s. 2, which provides (sub-s. 1) that for the purposes of the Act any instrument under which any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates a settlement, and (sub-s. 3) that land, the subject of a settlement, is settled land, and (sub-s. 4) that the determination of the question whether land is settled land is governed by the state of facts and the limitations of the settlement, at the time of the settlement taking effect, and (sub-s. 5) that the person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is the life tenant of that land, and the life tenant under that settlement. If this is not so, the policy of the Act could be defeated by the assignment of a fraction of the life interest to a stranger, as it would be at once necessary to trace both that fraction and the remainder in order to see that they had not coalesced. This has never been done in practice.

Northcote, for the purchasers. If the life tenant assigns his whole estate to the remainderman the settlement is at an end, and the powers are no longer required: *In re Mundy and Roper's Contract.* (1) If the life estate is assigned to a stranger, the stranger can give a general consent to the exercise of the powers, in which case the subsequent purchase of the remainder would not destroy the powers. But unless this is done there is a risk of merger, total or partial. In the present case the only land remaining in settlement is the one-third undivided share. This is land within s. 2, sub-s. 10 (i.), and the life tenant can only deal with it as an undivided share. A title to the entirety can only be made by obtaining the joinder or concurrence of the persons entitled to the other undivided shares, as authorized by s. 19.

SWINFEN EADY J. The object of s. 50 of the Settled Land Act, 1882, is to enable a life tenant to exercise the powers of

(1) [1899] 1 Ch. 275, 296.

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the Act notwithstanding any assignment of his life estate. He cannot release or contract not to exercise those powers, and if he assigns his life estate for value he can still exercise his powers, but not so as to prejudice the rights of the assignee without his consent. In the present case it is contended that, owing to certain alleged assignments to remaindermen, the settlement is at an end as to two-thirds of the entire estate. But, in my opinion, the whole property still remains subject to the limitations of the settlement, and the vendor is still life tenant thereof within the meaning of the Settled Land Acts. There is nothing in those Acts to shew that when a life tenant parts with his life estate in an undivided share of the property to a remainderman his powers are to cease in respect of that share. It is contended that they cease by the operation of the law of merger, and for this contention certain observations of Chitty L.J. in *In re Mundy and Roper's Contract* (1) are relied on. Chitty L.J. says: "It may be that if the settlement consists merely of a life estate in A. with remainder to B. in fee, and A. surrenders his life estate to B., the power is gone under the doctrine of merger; and that such a case is not within the section, because where the settlement is thus brought to an end and exhausted there is no reason why such a power should continue after the absolute fee simple is vested in possession. I say 'may be,' because it is not necessary to consider such a case, which does not arise upon the facts before us." But those observations, which are prefaced by the words "It may be," are directed to a case where an entire life estate has merged, so that the fee simple is vested in possession, and are based on the assumption that in such a case there is no reason why the powers should continue. In the present case, where at most only a portion of the life estate is gone, and the life tenant is still beneficially entitled to the remaining portion, and where it may be to the interest of all parties that she should be able to exercise her powers, I am of opinion that her powers still continue as to the entirety, and that the whole property is still settled land. The life

(1) [1899] 1 Ch. 275, 296.

tenant can therefore make a title to the entirety with the consent of her alleged assignees.

Solicitors : *Richard F. & C. L. Smith, for Septimus Gladstone Ward, Newcastle-upon-Tyne; Speechly, Mumford, Rodgers & Craig, for J. M. Hayton, Town Clerk, South Shields.*

G. R. A.

In re LLOYD. LLOYD *v.* LLOYD.

[1872 L. 58.]

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July 21, 22; *Dec.* 6.

Mortgagor and Mortgagee—Proceeds of Sale of Real and Personal Estate—Reversionary Interest, Mortgage of—Administration Action—Fund in Court—Payment out—Summons—Application by Mortgagor—Redemption—Interest—Arrears, Mortgagee's right to recover—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, c. 27), *s.* 42—*Lord Chancellor sitting alone in Court of Appeal—Court of Appeal, Decision binding on.*

Where a mortgagor applies by summons as against the mortgagee, that a fund in court in an administration action, being the proceeds of sale of the mortgaged property (real and personal estate under a will), may be paid out to him, the mortgagor, after payment thereout to the mortgagee of six years' interest only, in addition to the principal, he is in the same position as if he had brought an action for redemption, and therefore cannot recover the fund except upon the usual redemption terms of payment of principal together with the full arrears of interest, s. 42 of the Real Property Limitation Act, 1833, having no application to the case.

A testator, who died in 1862, by his will gave his real and personal estates to trustees upon trust to pay the income to his widow for life, and after her death to sell the same and stand possessed of the proceeds in trust for his children equally. In January, 1867, F., one of the children, conveyed his reversionary interest in his share under the will to A., subject to a proviso for redemption on repayment to A. of 500*l.*, with interest at 5 per cent. per annum, in July, 1867. The mortgage contained the usual mortgagor's covenants for payment of the principal, and also of interest at 5 per cent. per annum so long as the principal remained unpaid: and it was agreed that A., his heirs, &c., should, out of any real and personal estate which should be received by him and them under the mortgage, pay all moneys owing on the security and pay the surplus (if any) to F. The mortgage contained a power of sale, but there was no power of attorney enabling the mortgagee to sue or give receipts in the absence of the mortgagor.

In August, 1867, F. died intestate. In 1872 an action was brought for the administration of the testator's estate, and under orders made in the

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action his real and personal estates were sold, F.'s share of the proceeds being carried to his separate account in the action. In 1887 A. died, having by will appointed executors. The testator's widow died in 1900, and in 1901 F.'s administrator applied by summons, A.'s executors being respondents, for payment out to him of F.'s fund in court, after payment thereout to A.'s executors of the principal due on the mortgage, together with not more than six years' arrears of interest:—

Held (reversing Farwell J.), that, notwithstanding s. 42 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), A.'s executors were entitled to receive out of the fund their full arrears of interest before F.'s administrator received anything.

In re Slater's Trusts, (1879) 11 Ch. D. 227, overruled.

Whether the decision of a Lord Chancellor sitting alone in the Court of Appeal is binding on that Court, discussed.

EUSEBIUS ARTHUR LLOYD, by his will dated December 14, 1861, devised and bequeathed all his freehold, leasehold, and copyhold estates, and also all his moneys, securities for money, personal estate and effects (except as therein mentioned), to trustees, upon trusts for payment of debts, funeral and testamentary expenses, and legacies, and, subject to such payments, upon trust to receive the rents, interest, and dividends of his real and personal estates, and to pay the same, by half-yearly payments, to his wife during her life, or so long as she should continue his widow; and from and after the death or second marriage of his wife, and so soon as his children, being sons, should have attained the age of twenty-one years, and being daughters, should have attained that age or been married, he gave, devised, and bequeathed all his said real and personal estates (except as aforesaid) to his said trustees, their heirs, executors, administrators, and assigns, upon trust to make sale and dispose of his lands, messuages, and premises as therein mentioned; and upon trust to sell, call in, and convert into money such parts of his personal estate as should not consist of money, and to stand possessed of the moneys to arise from such sale, calling in, and conversion, upon trust for the benefit of all his children who, being a son or sons, should have attained the age of twenty-one years, or, being a daughter or daughters, should have attained that age or been married, to be divided among them in equal shares.

The testator died on March 4, 1862, leaving surviving him

his widow and several children, including a son, Francis Lloyd, who attained twenty-one previously to 1867.

By an indenture of mortgage dated January 19, 1867, Francis Lloyd granted and assigned all the part or share to which he was or thereafter might be equitably entitled of and in the real and personal estates of the testator, as one of his children, or otherwise, beneficially, or in the stocks, funds, moneys, or securities for money for the time being constituting or representing such real and personal estates, to Charles John Allen, his heirs, executors, administrators, and assigns respectively, subject to a proviso for redemption on repayment to Allen of 500*l.* (stated to be owing to him) together with interest thereon at 5 per cent. per annum on July 19, 1867. The mortgage contained covenants on the part of Francis Lloyd in the usual form for payment of 500*l.*, and also of interest at 5 per cent. per annum, so long as the 500*l.* or any part thereof should remain unpaid; and it was agreed and declared that Allen, his heirs, executors, administrators, and assigns, should, by and out of any real and personal estate which should be received by him and them in pursuance of the grant and assignment therein contained, in the first place, pay all costs and expenses in relation to the premises, and, in the next place, pay and satisfy the moneys for the time being owing on the security, and then pay or transfer the remainder and surplus (if any) to Francis Lloyd. The deed contained a power of sale, but there was no power of attorney enabling the mortgagee to sue or give receipts in the absence of the mortgagor.

On July 31, 1867, one Boss recovered judgment against Francis Lloyd in respect of a debt, which by a written agreement, dated March 20, 1867, Francis Lloyd agreed to secure by a mortgage of his interest under the will of the testator.

On August 5, 1867, Francis Lloyd died intestate, and an administrator was appointed to his estate. On October 7, 1867, Boss assigned the benefit of his judgment and the securities for the same to C. J. Allen. C. J. Allen died in 1887, leaving a will appointing executors.

In 1872 the present action was instituted for the administration of the estate of the testator E. A. Lloyd, and, under orders

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made in it from time to time, his real and personal estates were sold, and the proceeds divided, the share of Francis Lloyd being carried over to a separate account entitled, "Share of Francis Lloyd deceased, subject to incumbrances."

On January 14, 1900, the testator's widow died.

On July 6, 1901, Francis Lloyd's administrator took out a summons in the action for payment out of the fund after payment of the principal sums due to C. J. Allen's executors (who were made respondents to the summons), under the mortgage and judgment, together with six years' interest thereon respectively, as to the mortgage debt, at 5 per cent., and, as to the judgment debt, at 4 per cent. The respondents contended that they were entitled to the full arrears of interest on the two principal sums from the respective dates of the securities, up to the actual day of payment, before the applicant could receive any part of the fund.

At the hearing of the summons on November 1, 1901, Farwell J. held that the respondents, Allen's executors, were entitled to six years' interest only, and made an order accordingly.

Allen's executors appealed.

The appeal was heard on July 21, 22, 1902.

Butcher, K.C., and *R. J. Parker*, for the appellants. It is submitted that, on coming to redeem, the mortgagor must pay all arrears of interest, not merely interest for six years. The mortgage and the judgment both stand on the same footing, and therefore our argument may be confined to the mortgage only. This summons is in substance a redemption action. Farwell J. held that s. 42 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27) (1), applies, and no doubt the decisions are conflicting. Our contention is (1.) that where the

(1) Sect. 42 enacts that, "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. . . ."

mortgaged property is, as it is here, personalty only, there is no Statute of Limitations which applies.

[*Levett, K.C.*, for the administrator of the mortgagor, admits this.]

(2.) The mortgage money is not "charged upon or payable out of any land" within the meaning of s. 42. The charge is upon the proceeds of the sale of land. (3.) Even if the mortgage is a charge upon land, s. 42 does not apply to a redemption action. (4.) Sect. 42 (1) does not apply to a mortgage of a reversionary interest. The important points are (2.) and (3.).

In *Jordan* v. *Young* (2) Bacon V.-C. held that the statute did not apply to a mortgage of a reversionary interest in the proceeds of sale of leaseholds. But in *Bowyer* v. *Woodman* (3) Wood V.-C. held that s. 42 applied to a mortgage of a reversionary interest in the proceeds of land devised on trust for sale, and that the mortgagee could not recover more than six years' arrears of interest. This decision, however, was really based upon *Tuer* v. *Turner* (4) and *Briggs* v. *Chamberlain* (5), in which it was held that the reversionary interest of a married woman in the proceeds of land directed to be sold can be effectually disposed of by her and her husband under s. 77 of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74). But the definition of "lands" in s. 1 of that Act differs from that of "land" in s. 1 of the Limitation Act, and moreover the Fines and Recoveries Act is an enabling Act.

[STIRLING L.J. You say the interest which is charged must be one which can be the subject of tenure?]

Yes. The object of the section was to protect land. If in this case the mortgagor had an interest in land, still the mortgagee got only the mortgagor's share of the money resulting from the sale of the land.

[*Levett, K.C.*, referred to *Smith* v. *Hill.* (6)]

As to (3.), this is not a proceeding taken by the mortgagee to "recover" interest. The proceeding is by the mortgagor,

(1) Ante, p. 388, n. (1).
(2) W. N. (1878) 229.
(3) (1867) L. R. 3 Eq. 313.
(4) (1855) 20 Beav. 560.
(5) (1853) 11 Hare, 69.
(6) (1878) 9 Ch. D. 143.

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against whom, by the terms of the mortgage, the mortgagee's title has long since become absolute, and who comes to the Court and asks to be allowed to redeem: he ought not to be allowed to do so except on the terms of paying all the interest which by his mortgage contract he has agreed to pay. There is no reason why in such a case the legal right of the mortgagee should be cut down: *Edmunds* v. *Waugh* (1); *In re Marshfield* (2); *Dingle* v. *Coppen.* (3)

This is not a proceeding in the nature of a foreclosure action, which is an action for the recovery of land, so that in such an action the mortgagee cannot recover more than six years' interest: *Harlock* v. *Ashberry.* (4) This is really a redemption action, to which s. 42 does not apply, and therefore the mortgagee can recover the whole of his arrears of interest. In *Dingle* v. *Coppen* (3) the action was by the mortgagee for foreclosure, and the mortgagor counter-claimed for redemption: the question was, on what terms could the mortgagor be allowed to redeem, and Byrne J. held he could only do so on payment of the full arrears of interest and costs from the date of the mortgage. That case virtually overruled *Mason* v. *Broadbent.* (5)

With regard to the authorities, it is submitted that in *Mason* v. *Broadbent* (5) Lord Romilly M.R. came to a wrong conclusion, his attention not having been called to the precise language of s. 42; and in *Edmunds* v. *Waugh* (6), Kindersley V.-C. said he could not concur in Lord Romilly's conclusion.

In re Stead's Mortgaged Estates (7) was the case of a mortgagee of land petitioning for payment out of court of money paid in on the purchase of land under the Lands Clauses Act. Malins V.-C. held that the petition was "analogous to a suit for the recovery of land," and that therefore only six years' interest could be recovered. But the analogy is difficult to follow. That case, however, is different from the present, for here it is the mortgagor, and not the mortgagee, who is

(1) (1866) L. R. 1 Eq. 418.
(2) (1887) 34 Ch. D. 721.
(3) [1899] 1 Ch. 726.
(4) (1882) 19 Ch. D. 539.
(5) (1863) 33 Beav. 296.
(6) L. R. 1 Eq. 421.
(7) (1876) 2 Ch. D. 713.

applying for payment out, and this he is only entitled to on the terms of the mortgagee receiving his full arrears of interest.

In re Slater's Trusts (1) was, it is submitted, wrongly decided. There, although the mortgagor was the petitioner for payment out of a fund in court, Bacon V.-C. allowed the respondent, the mortgagee, six years' interest only, on the ground that if the mortgagee had himself taken proceedings he could only have recovered that limited interest. But the Vice-Chancellor overlooked the language of s. 42 and the difference between a mortgagee who is taking proceedings and a mortgagee who is resisting them. That decision ought, therefore, not to be followed. The interest we are asking for here is not interest on money charged on land, to which alone s. 42 applies, but interest on a mortgage debt charged on proceeds of sale: *Smith* v. *Hill.* (2)

Upon one of the minor points, the fourth, as to the mortgage being of a reversionary interest, it has been held by Wood V.-C. in *Wheeler* v. *Howell* (3), as well as by Bacon V.-C. in *Jordan* v. *Young* (4), that s. 42 has no application so long as the subject of the mortgage is a reversionary interest. We admit that there are three cases the other way, namely, *Vincent* v. *Going* (5), *Sinclair* v. *Jackson* (6), and a dictum of Hall V.-C. in *Smith* v. *Hill* (7); but we submit that the more recent decision in *Wheeler* v. *Howell* (3), which is directly in point, should be followed.

Then as to the other minor point, the first, it is submitted that, as the mortgaged property consists of personalty, it is not subject to any Statute of Limitations.

[ROMER L.J. Is that so? It must be observed that s. 42 deals not only with interest on money charged on land, but also with interest on "any legacy." There are several cases in which the Court has allowed only six years' interest on legacies, although no "distress, action or suit" has been brought. For

(1) 11 Ch. D. 227.
(2) 9 Ch. D. 143, 150.
(3) (1857) 3 K. & J. 198, 201.
(4) W. N. (1878) 229.
(5) (1844) 1 J. & Lat. 697.
(6) (1853) 17 Beav. 405.
(7) 9 Ch. D. 143.

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example, *Hughes* v. *Williams* (1), *Chappell* v. *Rees* (2), and *Thomson* v. *Eastwood.* (3)]

It is submitted that the Court should apply to this case the analogy of a trust legacy; as where legatees, who had waited for payment of their legacies until the falling in of a reversion, were not limited to six years' interest: *In re Blachford.* (4) *Hughes* v. *Williams* (1) was not the case of a simple legacy, but of a legacy charged on land, and therefore coming within the very words of s. 42, as being a "sum of money charged upon or payable out of land." The Court will not, merely because the mortgagee may be proceeding otherwise than by "distress, action or suit," take away his legal right to the full payment of his principal, interest, and costs.

[ROMER L.J. *Chappell* v. *Rees* (2) is a decision by a Lord Chancellor, Lord St. Leonards. Is it not therefore binding on this Court?

VAUGHAN WILLIAMS L.J. My impression is that the decision of a Lord Chancellor, when sitting in the Court of Appeal, is not binding on that Court.]

As a rule, the Court of Appeal treats decisions of that Court as binding authorities unless manifestly wrong: *Mills* v. *Jennings* (5); *In re Hallett's Estate.* (6) But in *Ashworth* v. *Munn* (7) James L.J. said he did not think the decision of a Lord Chancellor was absolutely binding upon the Court of Appeal, for every Lord Chancellor's decision was liable to be reheard, not only by himself, but by his successor.

[VAUGHAN WILLIAMS L.J. In *Wheeldon* v. *Burrows* (8) Thesiger L.J. said it ought not to be laid down as an absolute rule that decisions of a Lord Chancellor, sitting alone, were to be taken as decisions of the Court of Appeal and absolutely binding on that Court; though no doubt the greatest weight ought to be given to such decisions, and, unless shewn to be manifestly wrong or contrary to the general current of authority, this Court ought not to take upon itself to overrule them.]

(1) (1850) 3 Mac. & G. 683.
(2) (1852) 1 D. M. & G. 393.
(3) (1877) 2 App. Cas. 215.
(4) (1884) 27 Ch. D. 676.
(5) (1880) 13 Ch. D. 639, 648.
(6) (1880) 13 Ch. D. 696, 744–5.
(7) (1880) 15 Ch. D. 363, 377.
(8) (1879) 12 Ch. D. 31, 54.

The general result seems to be this—that the Court of Appeal is not bound by its own decisions, and, if they are wrong, may disregard them.

To return to the question whether this proceeding is not in substance a redemption action, and therefore exempt from s. 42. If it is, as we say it is, substantially a redemption action, then what the mortgagor is doing is attempting to get away from the mortgagee the property which constitutes his security; but this he cannot do until full payment has been made, including all arrears of interest. It was at one time held that in a foreclosure action six years' interest only could be recovered, it being supposed that a foreclosure action was an action to recover money; but it was subsequently decided by the House of Lords in *Heath* v. *Pugh* (1) that a foreclosure action was not an action for the recovery of money, but an action for the recovery of land; and certainly a redemption action is not an action for the recovery of money. That being so, s. 42 does not apply to such an action.

[STIRLING L.J. In *Hunter* v. *Nockolds* (2) it was held by Lord Cottenham L.C. that only six years' arrears of an annuity charged on land could be recovered.]

That case has been reflected on since: it has been followed in cases of foreclosure, not of redemption. The test as to whether, within s. 42, money is charged on land or not, is whether the owner of the land is a necessary party to an action to enforce the security. Here the owner of the land is not a necessary party to such an action. A charge on an interest in land is not a "charge on land" within the section.

[They also referred to *Henry* v. *Smith* (3), where it was held that debts secured by judgments were "sums of money charged upon or payable out of land" within s. 42, so that six years' interest only could be recovered.]

Levett, K.C., and *Errington*, for the respondent, the administrator of Francis Lloyd the mortgagor. The first point is whether the property mortgaged is "land" within s. 42. Upon

(1) (1881) 6 Q. B. D. 345; (1882) 7 App. Cas. 235.
(2) (1850) 6 Mac. & G. 640.
(3) (1842) 2 D. & War. 381; 59 R. R. 738.

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this one must see what the Act itself says. The word "land" in s. 42 is defined in s. 1 as extending to "all corporeal hereditaments . . . . and also to any . . . . estate or interest in them or any of them." Now it is clear on the authorities that an interest in the proceeds of sale of land constitutes an "interest in land." It is a chattel interest in land—an interest passing to the executor or administrator. There is nothing in s. 42 to take away from an "interest in land" the meaning which has always been given to it by this Court. For instance, a mortgage debt charged by husband and wife on the wife's reversionary interest in a fund the proceeds of land was held to be "money payable out of land" within s. 42, so that the mortgagee could only recover six years' arrears of interest: *Bowyer* v. *Woodman*. (1) Then, what is a mortgage of "land" within the section? It is a security whereby a "sum of money is charged upon or payable out of land"; and the money claimed by the mortgagee in the present case is money payable out of the proceeds of land. No money can possibly be paid out of land except by a sale; and therefore money obtained by a sale of land must in fact come out of, or be "payable out of," land: the land is the only source from which payment is possible.

If the mortgagee's representatives here were asking for payment to themselves of the whole fund in court, the Court would pay them only the principal of their mortgage debt and six years' arrears of interest: *In re Bell*. (2) The fact that there is a trust for sale makes no difference: the Court does not say that where there is a trust for sale there is no bar. It matters not whether the mortgagor holds under a trust of the land itself or under a trust of the proceeds of the land; a difference in the form under which the mortgagor takes his interest in the land cannot alter the express provisions of the Act: the interest is either a chattel interest going to the executor or administrator, or an interest in fee going to the heir. Again, why should the mere fact that the mortgagor's interest is one in reversion and not in possession make any difference? Sect. 42 does not itself make any distinction. Then it must be

(1) L. R. 3 Eq. 313. (2) [1896] 1 Ch. 1, 5.

borne in mind that the mortgage contains a covenant by the mortgagor for payment of principal and interest; and it has been held that the section applies to the personal remedy under such a covenant as well as to the remedy against the land: *Sutton* v. *Sutton*. (1)

[ROMER L.J. The question is, Who is the person liable to pay within the section? The money must be "money payable out of any land." Does not that mean that it must be money payable by the person who owns the land? Does not the section apply only to a case where the person who contracts the debt is the owner of the land?]

The section does not say so: it merely says that the money must be "payable out of any land," not necessarily only out of land in the hands of the mortgagor. *Bowyer* v. *Woodman* (2) is a clear authority that where the mortgage is of proceeds of sale of land six years' interest only is payable.

[VAUGHAN WILLIAMS L.J. Apart from that case, is there any other authority that an interest in the proceeds of sale of land is an "interest in land"?]

Yes; it is so laid down in the numerous cases on mortmain. "Payable out of the land" signifies "payable by means of sale of the land," that is, a sale as in the present case.

[ROMER L.J. The question in *Bowyer* v. *Woodman* (2) was not, what the wife's interest was, but what the mortgage debt was. Wood V.-C. did not deal with the nature of the wife's interest at all.]

But Hall V.-C., in commenting on that case in *Smith* v. *Hill* (3), says the question "considered and decided" was whether the wife's interest was "an interest in land" within the section. It is submitted therefore, on our first point, that the case falls within s. 42. Our second point is this. It has been contended on behalf of the appellants that the section does not apply because they are not proceeding to recover the arrears of interest by "distress, action or suit." But it is submitted, on principle, that if a mortgagee wants money in court to be paid out to him he must necessarily put himself in the

(1) (1882) 22 Ch. D. 511, 519, 520.
(2) L. R. 3 Eq. 313.
(3) 9 Ch. D. 143, 149.

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necessary position for asking for it, that is, in the position of plaintiff. As Bacon V.-C. said in *In re Slater's Trusts* (1), if he wants it he must come for it. It does not matter whether he comes by action or by petition: there is no authority shewing in what form the claim should be made. There is no reason why, if he asserts his claim by taking a proceeding which saves the expense of bringing an "action or suit," he should be in a better position than if he had asserted it by action or suit. What he gets as respondent in such a case as the present he gets in fact as claimant. *In re Slater's Trusts* (1) is a clear authority in our favour, for there the mortgagee obtained payment of his principal out of the fund in court, but only with six years of interest, although, as here, he was not himself the applicant, but was respondent to the application, which was by petition.

[STIRLING L.J. But in *Edmunds* v. *Waugh* (2) Kindersley V.-C. held that a petition was not a suit to recover arrears of interest within s. 42, and that therefore the mortgagees, who were petitioners, could recover more than six years' interest.]

In that case the question was merely one of retainer, the position of the parties being as if the mortgagee had the money in his pocket as mortgagee. What the Vice-Chancellor was really dealing with was that right of retainer, as pointed out by Malins V.-C. in *In re Stead's Mortgaged Estates.* (3) But that is not the position here.

[They also mentioned *Greenway* v. *Bromfield.* (4)]

Butcher, K.C., in reply. Sects. 2, 24, and 40 of the Act shew that "land" must mean land of some tenure, and not proceeds of sale of land at all. Sect. 42 applies only to the mortgagor, the owner of the land, and to the mortgagee. Here, the mortgagor is not owner of the land, but a person entitled to a share of the proceeds only of the land. In *In re Frisby* (5) it was held that s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which is closely analogous to s. 42 of the

(1) 11 Ch. D. 227.
(2) L. R. 1 Eq. 418.
(3) 2 Ch. D. 713, 717.
(4) (1851) 9 Hare, 201.
(5) (1889) 43 Ch. D. 106, 117.

Act of 1833, was not intended to apply to personal actions under a covenant in a mortgage if not brought against the mortgagor or his representatives. In *Mellersh* v. *Brown* (1) it was sought to extend the analogy of the statute to a mortgage of personal estate, but Kay J. declined to go beyond a statute which, as he said, dealt only with real estate. Therefore it is submitted that the section applies to a mortgage of land only and not to a mortgage of the proceeds of land. Here, the mortgagees are not taking any proceedings whatever for the recovery of interest: the proceedings are being taken by the mortgagor, who is applying for payment out to him of the mortgaged fund, and the simple question is, upon what terms should it be paid out to him. This fund is to be regarded as the mortgagees' security under their contract with the mortgagor; and there is no reason why a Court of Equity should fix a limit on the number of years for which they can recover interest under that contract. [He also mentioned *Re Wolmershausen.* (2)]

VAUGHAN WILLIAMS L.J. We will take time to consider our judgment.

Cur. adv. vult.

1902. Dec. 6. The judgment of the Court (Vaughan Williams, Romer, and Stirling L.JJ.) was delivered by

STIRLING L.J., who, after stating the facts as above, proceeded:—It was admitted that the rights in respect of the judgment were precisely similar to those in respect of the mortgage; and the argument dealt with the mortgage only, and the following judgment is therefore specifically directed to the mortgage, without further mention of the judgment. The question is whether s. 42 of 3 & 4 Will. 4, c. 27, applies to the case. It was admitted at the bar on behalf of the respondents that, if the fund in court represented personal estate of the testator only, this section could not apply, and it was contended on behalf of the appellants that, even although the fund consisted to a large extent of the investment of proceeds of real estate, nevertheless they were entitled on various

(1) (1890) 45 Ch. D. 225, 229. (2) (1890) 62 L. T. 541.

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grounds to full arrears of interest. In the view which we take, it is necessary to consider only one of these grounds.

It was said that the arrears of interest were not being recovered "by any distress, action or suit"; that the enactments in 3 & 4 Will. 4, c. 27 and c. 42, only destroyed the remedy for the arrears of interest, and not the debt itself; and that the Court ought not to accede to the application of the legal personal representative of the mortgagor, except on the terms of payment out of the fund of all arrears. In considering whether effect ought to be given to this contention, it is necessary to pay somewhat close attention to the course of decision on the provisions of the statutes of 3 & 4 Will. 4, c. 27 and c. 42, with reference to mortgages. The material enactments are the following: 3 & 4 Will. 4, c. 27, s. 40, says that "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, ... but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." Sect. 42 says, "No arrears . . . . of interest in respect of any sum of money charged upon or payable out of any land or rent . . . . shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due." 3 & 4 Will. 4, c. 42, s. 3, says that "All actions of covenant or debt upon any bond or other specialty . . . . shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say . . . . within twenty years after the cause of such actions or suits, but not after."

In *Dearman* v. *Wyche* (1), decided in 1839, it was held by Shadwell V.-C. that a foreclosure suit was a suit for the recovery of the money secured by the mortgage within the meaning of 3 & 4 Will. 4, c. 27, s. 40. Of this decision Lord St. Leonards expressed his approval in *Henry* v. *Smith* (2), decided in 1842, but subsequently in *Wrixon* v. *Vize* (3),

(1) (1839) 9 Sim. 570. (2) 2 D. & War. 381, 387.
(3) (1842) 3 D. & War. 104, 121.

decided later in the same year, he found himself unable upon further consideration to take this view, and held that the true nature of a foreclosure suit was for the recovery of the equity of redemption of the mortgaged property, and consequently that the provisions of the statute 3 & 4 Will. 4, c. 27, applicable to foreclosure suits were to be found, not in s. 40, but in the early clauses of the Act. It has now been decided in *Heath* v. *Pugh* (1), both by the Court of Appeal and the House of Lords, that the opinions expressed by Lord St. Leonards in *Wrixon* v. *Vize* (2) are well founded in law. In the meantime, however, the view taken by Shadwell V.-C. was adopted by other judges in England, and in particular by Wigram V.-C. in *Du Vigier* v. *Lee* (3) and by Lord Romilly M.R. in *Sinclair* v. *Jackson* (4), and influenced their decisions with reference to the meaning and effect of s. 42 of the same Act.

In *Du Vigier* v. *Lee* (3), decided in 1843, it was held that, under the statutes 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3, a mortgagee of land, whose mortgage debt and interest were also secured by a bond or covenant, was entitled in a foreclosure suit to charge the mortgage estate with the arrears of interest accruing on the mortgage debt within twenty years before the institution of the suit. The accuracy of this determination came to be considered in 1850 by Lord Cottenham L.C. in *Hunter* v. *Nockolds*. (5) This was a suit instituted for the purpose of establishing an incumbrance on the estate of Sir Francis Vincent, in which a petition was presented by persons claiming to be entitled to an annuity charged on the estate subject to the incumbrance. On the petition an order was made by which it was referred to the master to inquire whether the petitioners were entitled to any and what annuity and charge upon the estate in question and, in case he should find they were so entitled, what was due in respect of such annuity. The master found that the petitioners were entitled to an annuity of 111*l.* charged upon the estate,

(1) 6 Q. B. D. 345; 7 App. Cas. 235.
(2) 3 D. & War. 104, 121.
(3) (1843) 2 Hare, 326, 334.
(4) 17 Beav. 405, 410.
(5) 1 Mac. & G. 640.

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and that there were due to the petitioners twenty-four quarterly payments of the annuity during the period of six years previously to the date of the order, and no more. The petitioners, however, claimed the whole of the arrears of the annuity from February 5, 1829, the date of the deed by which the annuity was created, to May 5, 1848, and excepted to the master's report. The exceptions were allowed by Wigram V.-C., and from this decision an appeal was brought. The Lord Chancellor held that the object of the Act 3 & 4 Will. 4, c. 27, was to relieve land from arrears of charges beyond six years, and that its provisions were applicable only to land, while the provisions of the later Act, 3 & 4 Will 4, c. 42, related only to the personal remedy in actions upon covenant or debt upon specialty, and held that the petitioners were entitled to only six years of the annuity against the land. A similar decision was given by Lord St. Leonards in *Hughes* v. *Kelly* (1), as to which it is to be observed that the incumbrancer was a defendant to the suit, who neither presented any petition, nor took any active steps to enforce his charge. This charge, however, was one created, not by way of mortgage to secure a debt, but by a voluntary settlement conferring benefits on the settlor's children.

In *Sinclair* v. *Jackson* (2), decided in 1853, it was held by Lord Romilly M.R. that a mortgagee of a reversionary interest in land could only recover six years' arrears of interest as against the land mortgaged, although he might recover twenty years' arrears on the covenant to pay.

In *Shaw* v. *Johnson* (3), decided in 1861, Kindersley V.-C. held, on the authority of *Hunter* v. *Nockolds* (4), that a mortgagee could not in a foreclosure action have an account of arrears of interest for more than six years, although the mortgage deed contained a covenant to pay the principal and interest.

In *Round* v. *Bell* (5), also decided in 1861, the same point was decided by Lord Romilly M.R. From that time down to

(1) (1843) 3 D. & War. 482.
(2) 17 Beav. 405.
(3) (1861) 1 Dr. & Sm. 412.
(4) 1 Mac. & G. 640.
(5) (1861) 30 Beav. 121.

the present it has been the uniform practice in foreclosure actions to confine the plaintiff to six years' arrears of interest. It was suggested that this practice depended on the view of the nature of a foreclosure action which was held to be erroneous in *Heath* v. *Pugh*. (1) Although some judges were influenced by this view, we think that the practice was really governed by the decision of the Lord Chancellor in *Hunter* v. *Nockolds* (2), and it is impossible for this Court to depart from the rule which was thereby established. Still, all that the statute does is to take away from the mortgagee his remedy "by distress, action or suit"; and the general rule is that, where the remedy of a creditor for his debt is barred by statute, but the right remains, he may enforce that right by means of any lien or right of retainer that is available to him: see *Higgins* v. *Scott* (3); *Courtenay* v. *Williams*. (4) It was, however, held by Lord Romilly in *Mason* v. *Broadbent* (5), decided in 1863, that, where a sale of a mortgaged estate had been made by the mortgagee under a power of sale, and the mortgagor instituted a suit to recover the surplus remaining after satisfaction of the mortgage debt, the mortgagee could not retain more than six years' arrears of interest out of the purchase-money which he had received.

In *Edmunds* v. *Waugh* (6), decided by Kindersley V.-C. in 1866, the proceeds of sale of mortgaged property, sold under a power of sale in the mortgage by the trustees and executors of the will of the mortgagee, were paid into court in a suit for the administration of the mortgagee's estate, and the trustees and executors petitioned for payment out of the fund to satisfy nearly twenty years' arrears of interest. It was held that, if there had been no suit and the money had remained in the hands of the mortgagees, they would have been entitled to retain out of it all the interest which they claimed; that the fund in court was still constructively in their hands; and that the petition was not a suit to recover interest within the meaning of s. 42 of the statute. With respect to *Mason* v.

(1) 6 Q. B. D. 345; 7 App. Cas. 235.
(2) 1 Mac. & G. 640.
(3) (1831) 2 B. & Ad. 413; 36 R. R. 607.
(4) (1844) 3 Hare, 539, 551–2.
(5) 33 Beav. 296.
(6) L. R. 1 Eq. 418.

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Broadbent (1), the Vice-Chancellor said (2) that he could not concur in the conclusion that a bill by the mortgagor to recover the surplus money comes within the terms of s. 42, as being a suit by which arrears of interest are sought to be recovered, and he made these observations: "The intention of the Legislature, I think, was that if a man chose to let interest run into arrear for more than six years, and then come to a Court of justice to recover the interest, he should only be entitled to recover six years' interest; but it does not follow that the Legislature intended that a mortgagor who has lost his legal right, and comes to the Court insisting on his equity to redeem, should be allowed—although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment only of six years' interest. There would be no justice in such a construction of the statute. Is the omission of the mortgagor to pay the interest which he ought to have paid less culpable than the omission of the mortgagee to demand and enforce payment of it?"

In *In re Marshfield* (3), decided in 1887, it was held by Kay L.J. (then a judge of first instance), in accordance with the reasoning of Kindersley V.-C. in *Edmunds* v. *Waugh* (4), that first mortgagees of land who had sold the mortgaged property under their power of sale, and received the proceeds, were entitled as against the second mortgagees to retain more than six years' arrears of interest.

In *Dingle* v. *Coppen* (5) it was held by Byrne J. that a mortgagor seeking to redeem could only do so on paying all arrears of interest from the date of the mortgage.

In our opinion the reasoning of Kindersley V.-C. in *Edmunds* v. *Waugh* (4) is sound, and the decisions in that case and in *In re Marshfield* (3) and *Dingle* v. *Coppen* (5) are in accordance with law. Not one of these decisions, however, precisely covers the present case, in which the mortgagees have never had in their hands the proceeds of sale of the mortgaged property. Nevertheless, the mortgagees are not at the present time

(1) 33 Beav. 296.
(2) L. R. 1 Eq. 421.
(3) 34 Ch. D. 721.
(4) L. R. 1 Eq. 418.
(5) [1899] 1 Ch. 726.

seeking to recover arrears of interest by "distress, action or suit"; they have taken no step whatever for the recovery of arrears of interest. They claim under a mortgage deed by which the mortgagor assigned to them all his interest, subject to a proviso for redemption on a day long since gone by, and, according to the terms of the deed, their title has long since become absolute. No doubt the representative of the mortgagor is entitled to redeem, but on redeeming he would, according to the cases just mentioned, have to pay all the arrears of interest. He does not in form seek to redeem; he asks for payment to him of the surplus of the fund after deducting the principal and six years' arrears of interest only. Under the mortgage deed the representatives of the mortgagee have an interest in the fund to the extent of their principal and all their arrears of interest; but it is said that, if the representatives of the mortgagee applied for payment to themselves of the whole fund, the Court would refuse to hand it over to them, and would give them only the principal and six years' arrears of interest, and in support of this contention *In re Bell* (1) is relied on. That case shews that the Court will not hand over the whole of a mortgaged fund to first mortgagees, where that fund is more than sufficient for payment of what is due to the first mortgagees, in face of the opposition of subsequent incumbrancers; but it does not shew that the Court, merely in order to deprive a first mortgagee of interest for which he had lost his remedy, would withhold from him a fund his title to which remains unextinguished. But, however this may be, the mortgagees here (as has already been remarked) are not proceeding by "distress, action or suit." On the contrary, the pending proceeding is taken by the legal personal representative of a mortgagor against whom the mortgagee's title has become absolute, and on whom a Court of Equity has the power to impose terms as the price of the relief which it may see fit to give. We think that the representative of the mortgagor ought only to be allowed to recover the fund, as against mortgagees, upon the same terms as if he had brought an action for redemption.

(1) [1896] 1 Ch. 1.

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This does not, in our opinion, conflict with the decision in *Hughes* v. *Kelly* (1) already referred to, because, although in that case the incumbrancer was not taking active proceedings, still he was not a mortgagee whose title to the mortgaged property had become absolute, but was only entitled to an equitable charge, which had been created by a voluntary settlement, and carried with it no right of foreclosure: see *Sampson* v. *Pattison* (2), *Jenkin* v. *Row* (3), and *In re Owen.* (4)

Two cases have still to be considered. The first is *In re Stead's Mortgaged Estates.* (5) There money was paid into court under the Lands Clauses Act for the purchase of land which was subject to an equitable mortgage by deposit, with a memorandum undertaking to give a legal mortgage. The mortgagee petitioned for payment out of the fund. It was held by Malins V.-C. that the petition was analogous to a suit for recovery of the land, and, therefore, that the principal and six years' interest could alone be recovered. Whether this decision be well founded or not, it does not govern the present case, inasmuch as the mortgagor, and not the mortgagee, is here applying to the Court for payment.

The other case is in *In re Slater's Trusts.* (6) There a petition was presented by one of several mortgagors for payment out of a fund in court which was subject to a mortgage, the mortgagee being made a respondent to the petition. It was held by Bacon V.-C. that the mortgagee was entitled only to six years' arrears of interest, on the ground, as we understand it, that if he had taken proceedings of his own he could have recovered six years' interest and no more. This appears to us to overlook the terms of s. 42 and the difference in the position of a mortgagee who is proceeding actively himself and one who is simply resisting proceedings by his mortgagor. That decision is in point, but, in our opinion, it ought not to be followed. We think, therefore, that in the circumstances of this case, notwithstanding the statute 3 & 4 Will. 4, c. 27, s. 42, the

(1) 3 D. & War. 482.
(2) (1842) 1 Hare, 533; 58 R. R. 178.
(3) (1851) 5 De G. & Sm. 107.
(4) [1894] 3 Ch. 220.
(5) 2 Ch. D. 713.
(6) 11 Ch. D. 227.

appellants are entitled to receive their full arrears of interest out of the fund in court before the representatives of the mortgagor receive anything, and that the appeal ought accordingly to be allowed, with costs.

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Solicitors: *Norris, Allens & Chapman; Palmer & Bull.*

G. I. F. C.

EASTON *v.* ISTED.

[1901 E. 1151.]

C. A. 1902 JOYCE J. *March* 19, 20, 24. C. A. *Dec.* 18.

Easement — Ancient Lights — Enjoyment by "Consent or Agreement" — "Windows overlooking" — Skylight — Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

In 1873 the plaintiff erected upon his property adjoining that of the defendant a conservatory with a glazed roof sloping down to the vertical side of the conservatory, which side stood practically on the boundary line between the two properties. That vertical side was glazed, having sashes hung on hinges from the top, and made to open outwards over the defendant's property. The plaintiff at the time of the erection of his conservatory signed an agreement to pay 1*s.* a year "as an acknowledgment for allowing the windows in my conservatory adjoining to open on to and overlook" the defendant's property. The annual payments under the agreement were made down to 1888, when the conservatory was converted into a passage, the glazed side being bricked up, leaving the glazed roof as a skylight to the passage. In 1901 the defendant built a wall on his land along the boundary line, carrying it above the plaintiff's skylight so as to obstruct the access of light thereto. In an action to restrain the obstruction of the skylight as an ancient light:—

Held (by Joyce J. and by the Court of Appeal), that the skylight was a "window" overlooking the defendant's property within the terms of the agreement, and consequently that, the access of light having been enjoyed by consent or agreement in writing within s. 3 of the Prescription Act, 1832, the plaintiff's action failed.

TRIAL OF ACTION.

The plaintiff was the owner of an hotel known as the Golden Fleece, situated in Commercial Road, Portsmouth. The defendant was the owner and occupier of adjoining premises in the same road. The action was brought in respect of an alleged obstruction by the defendant of the access of light over a yard in the rear of his premises to a window or

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skylight over a passage or corridor on the northern side of the plaintiff's hotel. The plaintiff alleged that the skylight was an ancient light, and that he had enjoyed free and unobstructed access of light thereto, as of right, for twenty years and upwards before the commencement of the action without interruption.

In 1901 the defendant erected a wall and certain buildings at the back of his premises along or close to plaintiff's boundary line, causing the alleged obstruction. The defendant did not admit that the plaintiff's skylight was an ancient light, or that the access of light thereto had been enjoyed as of right and without interruption for the prescribed period. He contended that the access of light to the window in question had been enjoyed by agreement in writing within s. 3 of the Prescription Act, 1832. The window or skylight in question was inclined at an angle of somewhat less than 45 degrees to the plane of the horizon, and somewhat more than 45 degrees to the vertical. Its northern or lower side was practically on the line of boundary between the plaintiff's and defendant's properties, and, if and so far as it could be said to overlook anything, it overlooked the property of the defendant. It appeared that the window or skylight originally formed the sloping roof of a conservatory or corridor, erected by the plaintiff's father in 1873, on the northern side of the hotel, and abutting on the defendant's property. This roof was entirely glazed, and sloped down to the vertical side of the conservatory. This vertical side adjoined the defendant's property and was also glazed above a few feet from the ground, and stood practically on the boundary line between the two properties. Portions of this vertical side, amounting to something less than one-half thereof, were movable, being hung from the top upon a bar or hinges, and opening outward from the bottom so as, when open, to overhang the defendant's property.

At the time of the construction of this conservatory or corridor an agreement in writing, dated June 13, 1873, had been entered into between the then owners of the respective properties. It was signed by the plaintiff's father, and was as follows: "I hereby agree to pay to Mr. Isted of No. 43,

Commercial Road, Landport, the sum of one shilling per year as an acknowledgment for allowing the windows in my conservatory adjoining to open on to and overlook his property, and do also agree to close the same when required to do so."

The yearly payment of 1*s.* was duly made down to July 7, 1888, when the glazed side of the conservatory was bricked up. The sloping roof which formed the window or skylight in question was left in its original position, and gave light to what was now a corridor in the hotel. The plaintiff by this action asked that the defendant might be ordered to pull down so much of the building as obstructed the access of light to the window or skylight in question; and he also claimed damages.

The question was whether the skylight was a "window" within the agreement of June 13, 1873.

The action came on for hearing before Joyce J. on March 19, 1902.

Hughes, K.C., and *Ward Coldridge*, for the plaintiff. The agreement only related to the vertical windows of the conservatory. The plaintiff's father built up to the edge of his land, so that there was nothing to prevent the defendant from building on his own land so as to block the vertical lights altogether. But, as regards the sloping roof, Isted could not entirely block the access of light to that; and that being so, and there being probably a threat by the defendant to block the vertical lights, this agreement was entered into. The ordinary and natural meaning of the word "window" does not include a glass roof. In the Imperial Dictionary a window is defined as "An opening in the wall of a building for the admission of light and air." The agreement does not in the least relate to the skylight.

[JOYCE J. The parties to the agreement could not have intended to let the right of light to the skylight go on accruing, while that to the side windows was prevented.]

The payments under the agreement ceased when the vertical windows were bricked up.

The plaintiff is entitled to a mandatory injunction: *Baxter* v. *Bower*. (1)

(1) (1875) 44 L. J. (Ch.) 625.

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Kenyon Parker, for the defendant. This is an agreement to allow "windows" to be made "overlooking" the defendant's premises, and this skylight is clearly within it. The right to light, therefore, was only enjoyed in respect of the plaintiff's skylight by consent or agreement in writing within the meaning of s. 3 of the Prescription Act, 1832.

The plaintiff is not entitled to an injunction: *Bewley* v. *Atkinson*. (1)

Cur. adv. vult.

1902. March 24. JOYCE J. (after stating the facts and reading the agreement). The plaintiff's window or skylight, having been in existence ever since 1873, is what is called an ancient light unless the access of light thereto over the defendant's property was "enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing" within s. 3 of the Prescription Act, 1832. It is not contended before me, nor in my opinion could it be contended with success, that this arrangement is limited to the movable sashes in the northern and vertical side of the conservatory. It certainly extended and applied to the whole of the glazed portion of this side. But it is obvious, I think, that the object of this arrangement was to preclude the acquisition by the owners of the plaintiff's property of a statutory right to light over that of the defendant. It is suggested, however, that although while the arrangement continued and the annual payment of 1*s*. was duly made, as it was until 1888, no right was being acquired in respect of the glazed portion of the side, still such right was during this time being acquired in respect of the glazed portions of the sloping top notwithstanding the existence of the arrangement and the continuance of the payment. In my opinion it is almost impossible that this should have been intended by the parties to the arrangement, and I think the agreement very well bears the construction of what, I think, must have been the intention. The sloping top received rays of light across, and in that sense overlooked the defendant's property in the same manner as, though to a less degree than, the fixed portions of the side; and it is in respect of the obstruction by the defendant of these

(1) (1879) 13 Ch. D. 283.

very rays of light that the action is brought. If the written agreement applied as it did to the fixed and glazed portions of the side, it equally, in my opinion, applied to the glazed portions of the sloping top. A window is not less a window because it is not capable of being opened, nor is it less a window because it is not fixed in a vertical plane. I think the glazed top was just as much a window as the fixed portions of the vertical side, and, inasmuch as it received light over the defendant's property, I think it overlooked the property in the sense in which that term is used in the agreement.

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It appears to me that down to the year 1888 the right to the access of light over the defendant's property from the window or skylight in question was enjoyed by some consent or agreement expressly made for that purpose by the defendant in writing. It is clear, therefore, that the plaintiff had not enjoyed the access of light in question for the statutory term of twenty years, and in my opinion the action must be dismissed with costs.

G. A. S.

The plaintiff appealed. The appeal was heard on December 18, 1902. C. A.

Hughes, K.C., and *Ward Coldridge*, for the plaintiff, repeated the arguments used by them in the Court below.

[STIRLING L.J. read from a school dictionary the definition of a "skylight" as "a window in the roof of a house."]

Kenyon Parker, for the defendant, was not called upon.

VAUGHAN WILLIAMS L.J. I should be wasting time in saying more than that I not only affirm the decision of Joyce J., but agree in his reasons.

STIRLING L.J. I agree.

COZENS-HARDY L.J. I agree.

Solicitors: *James, Mellor & Coleman, for Hobbs & Brutton, Portsmouth; A. W. Mills, for Cousins & Burbidge, Portsmouth.*

G. I. F. C.

C. A. 1903 Jan. 19.

SACCHARIN CORPORATION, LIMITED *v.* WILD.

[1902 S. 746.]

Procedure—Patent—Infringement—Claim on several Patents—Separate Causes of Action, Combining in one Action—Particulars of Objections—Defence—Embarrassing Defendant—Limitation of Claim—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-s.* 2—*Rules of the Supreme Court*, 1883, *Order* XVIII., *rr.* 1, 8, 9; *Order* XIX., *r.* 27—*Appeal—Further Evidence, Admissibility of—Consent Order.*

In a patent action for infringement, as in every other kind of action, the onus is on the plaintiff to prove that he has a definite cause of action against the defendant, and he is not entitled to call upon the defendant to disprove the alleged infringement—in other words, to prove that the plaintiff has no cause of action against him. And this is so even where the plaintiff may be suing upon several patents in one action upon the ground that it is impossible for him, unless the defendant discloses the process of manufacture of the infringing article, to state definitely which of the patents in particular have or has been infringed.

The plaintiffs, the owners of twenty-three patents for "Saccharin," sued the defendant, a trader who had purchased and imported from foreign manufacturers an article called "Sucramine," for alleged infringement, all twenty-three patents being united in one action. In their particulars the plaintiffs stated generally that the defendant had infringed "all" the patents, but alleged only two specific cases of infringement. To enable him to prepare and deliver his defence with particulars of objections as required by s. 29, sub-s. 2, of the Patents, Designs, and Trade Marks Act, 1883, the defendant, who said he did not know the process of the manufacture of sucramine, applied to Kekewich J. by summons that the plaintiffs might be ordered to give further and better particulars of breaches, specifying which of the twenty-three patents they relied on as having been infringed, or that, under Rules of the Supreme Court, 1883, Order XVIII., rr. 1, 8, 9, and Order XIX., r. 27, the trial of the action might be limited to such of the twenty-three patents, as being separate causes of action, as to the Court might seem just. The evidence on the summons shewed that the patents were capable of division into three separate groups, so that the infringements specifically charged, if infringements of one group, could not be infringements of the others; but the plaintiff professed his inability to say which of the groups had been infringed. Kekewich J. ordered the summons to stand over until after the defence had been delivered:—

Held, on appeal, that the plaintiffs were not entitled to unite the twenty-three patents in one action, but must be limited to selecting a certain number of them, not exceeding three in the first instance, upon which they would proceed with their action.

Saccharin Corporation, Limited v. *Quincey*, [1900] 2 Ch. 246; 17 Rep.

Pat. Cas. 337, and *Saccharin Corporation, Limited* v. *Dawson*, (1902) 19 Rep. Pat. Cas. 169, distinguished.

In a patent action, further evidence by affidavit and cross-examination of the defendant as to when and where he obtained the alleged infringing article is not admissible upon an appeal except under special circumstances, or by the consent of the parties.

ON February 28, 1902, the plaintiffs, the Saccharin Corporation, Limited, issued the writ in this action, claiming an injunction to restrain the defendant, Edward Wild, a Lancashire manufacturing chemist, from the alleged infringement, by importing, manufacturing, selling, and using a certain sweetening compound called "Sucramine," of seventeen patents belonging to the plaintiffs and which were enumerated seriatim in the indorsement on the writ.

On May 23, 1902, the plaintiffs delivered a statement of claim alleging that the defendant had infringed "all the said letters patent," in the manner appearing in the particulars of breaches delivered with the statement of claim. These particulars stated generally that the defendant "had at divers times previously to the commencement of this action and subsequently thereto" infringed "all" the letters patent by importing and selling a substance known as "Sucramine" made in accordance with the inventions described in the specifications of "all" the said letters patent; but the particulars alleged two specific infringements only, being sales on two occasions to one Booth of Eccles, one of the alleged sales being of "a quantity of sucramine," and the other being of "a pound weight" of the same article. The particulars then went on to state that "the precise number, particulars, and dates of the defendant's infringements are at present unknown to the plaintiffs," but that the plaintiffs would claim to recover from the defendant full compensation in respect of "all such infringements."

On July 1, 1902, the defendant took out a summons in chambers asking that the plaintiffs might be ordered to give a further and better statement of the nature of their claim and further and better particulars of breaches, specifying which of the seventeen patents they relied on as having been infringed by the defendant by the sale of "Sucramine," or that an order

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might be made limiting the trial of the action, in the first instance, to such of the seventeen patents as to the Court might seem just.

In support of the summons an affidavit was filed on behalf of the defendant by Otto Heyner, a public analyst, stating that it was not possible for the whole of the seventeen patents to have been infringed by the two sales the plaintiffs had specifically mentioned; that the seventeen patents were not all directed to one and the same object, and did not all, or even for the most part, deal with successive steps in the manufacture of saccharin, but were for alternative and widely different modes of manufacture, starting sometimes from different materials; that the seventeen patents might be divided roughly into three groups, each group having distinct objects—the first group being of patents for purifying saccharin at different stages of the original "Fahlberg" process under a patent which was taken out in 1885, but expired in 1899; the second group being of patents for various modifications of the expired Fahlberg patent; and the third group dealing with processes entirely different from those of the other patents; that the seventeen specifications disclosed many alternative ways of arriving at saccharin which no manufacturer could follow at one and the same time, and consequently the alleged specific acts of infringement were impossible; that the subject being one of considerable intricacy it would be practically impossible in one action to go into or investigate the validity of the whole seventeen patents, which in several respects contradicted one another; and further that, having regard to the present state of the science and to the fact that the original Fahlberg patent (which had been employed on a large manufacturing scale) had lapsed, the patents in question did not cover all the methods by which saccharin could be made, and that various other methods besides those covered by the seventeen patents might be employed for the production of saccharin on a commercial scale.

In answer the plaintiffs filed an affidavit by Dr. Passmore, an analytical chemist, in which he stated that it was impossible for any one to tell by analysis or otherwise by what process

sucramine was manufactured, except that, if it had been manufactured according to the expired Fahlberg patent, it must have been subsequently purified by one or other of the plaintiffs' seventeen patents, and that it could only be made commercially by one or other of the processes protected by those patents; that unless the defendant stated by what process sucramine was manufactured, it was impossible to state definitely which of the patents had been infringed. He also denied that it was possible to produce saccharin on a commercial scale by any processes other than those covered by the plaintiffs' patents.

The summons came on before Kekewich J. in chambers on November 3, 1902, when he directed that the defendant should deliver his defence on or before December 15, and that the summons should stand over with liberty for the defendant to restore it, if he thought it necessary, after his defence had been delivered: the costs of the application up to and including that hearing to be the plaintiffs' in any event.

In the meantime the plaintiffs had, on July 28, 1902, amended their writ by adding six more patents to the seventeen previously specified, making twenty-three in all; and they delivered an amended statement of claim and amended particulars covering the whole of the twenty-three patents.

The defendant subsequently served the plaintiffs with a notice of motion before Kekewich J., by way of appeal from his decision in chambers on November 3, 1902, for the same relief as prayed by the original summons, except that it covered the whole twenty-three patents instead of the original seventeen only. This motion was heard by the learned judge on November 14, when he affirmed his previous decision and ordered that the motion should stand over until after the defence had been delivered: the defendant to pay the costs of the motion down to and including that hearing.

The defendant then gave notice of appeal to the Court of Appeal.

In support of the appeal an affidavit was filed by Mr. James, the defendant's solicitor, stating that he had had fifteen years' experience in the conduct of patent litigation; that upon the

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receipt of the statement of claim and particulars of breaches in the present action it was his duty to consider what steps should be taken to prepare the defence; that he found it would be necessary, before the defence could be settled, to have a search made as to the validity of the patents sued upon; that having regard to the number of the patents and to the fact that a search against chemical patents was especially difficult and laborious, such a search could only be efficiently made by an expert patent agent; that he accordingly consulted a particular firm of patent agents having special knowledge of chemical matters, who had informed him that the search would take a long time and involve considerable expense; that on receiving the report of the search it would further be necessary to obtain the assistance of a chemist as expert and to put the result of the search before him in order that counsel might have proper instructions for settling the statement of defence and particulars of objections; and that having regard to the fees of the experts and patent agents, solicitor's charges and counsel's fees, he estimated that, before the defence and particulars of objections could be delivered in the action in its present form, the costs incurred by the defendant could not be much less than 400*l*.

The appeal was opened on December 3, 1902, before Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.

In the course of the opening of the defendant's appeal it was stated that he had a bonâ fide case and was willing to make a full disclosure of the facts, and accordingly his counsel made an offer that he, the defendant, should state on affidavit all he knew about the alleged infringing article "Sucramine"—where and how he procured it and what he paid for it, and also to submit to cross-examination on the subject. This offer being accepted by the counsel for the respondents, the plaintiffs, their Lordships directed that the appeal should stand over for that further evidence to be taken, and that the time for delivering the defence should be extended until the appeal had been heard.

The defendant Wild accordingly filed an affidavit stating that in answer to a circular from the Trust Chimique of Lyons

advertising a product supplied by them and described as "Sucramine," he ordered a one-pound sample, for which he paid 25*s.*; that he tested it, and found the article so superior to any other sweetening agent he had previously used that he decided to buy a quantity; that he had been a consumer of saccharin for six years previously, and before deciding to use sucramine he satisfied himself by tests that sucramine and saccharin were distinct substances; that before buying any further quantity of sucramine he saw the managing director of the Trust Chimique at Lyons and asked him whether it could be alleged that sucramine was an infringement of saccharin, but was assured in reply that it was an entirely different product made under distinct patents; that he then asked the managing director whether he had any objection to telling him how sucramine was made, but this he, the managing director, refused to do on the ground that its manufacture was a trade secret which he could not disclose; and that he, the deponent, being satisfied with those assurances, confirmed by his own experiments, proceeded to order more sucramine, and to sell it and use it in his own business.

In cross-examination upon that affidavit the defendant stated that the managing director of the Trust Chimique declined, though asked to do so, to disclose the numbers of the patents under which his company manufactured sucramine: that he, the defendant, had taken an agency in England for the Trust Chimique, by whom he was, in March, 1902, given a guarantee by letter against attacks by the Saccharin Corporation for dealing in sucramine, and that the present action was being defended for him by the Trust Chimique. On being further pressed in cross-examination he stated that the managing director of the French company did tell him that the Fahlberg patent was one of the patents under which sucramine was being made, and that the company had three patents besides, but that beyond that the managing director declined to give any further information as to the patents; that since the guarantee he, the defendant, had bought from the French company altogether about one hundredweight of sucramine: this he himself paid for, and sold for himself.

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Upon this further evidence the appeal now came on for rehearing before Collins M.R., Stirling and Cozens-Hardy L.JJ.

Warrington, K.C., Astbury K.C., and *A. B. Shaw*, for the defendant. We submit that the plaintiffs ought not to be allowed to combine twenty-three separate causes of action, and thus throw upon the defendant the enormous expense of investigating the validity or invalidity of these numerous patents before he can put in his defence, for, under s. 29, sub-s. 2, of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), a defendant must deliver particulars of objections with his defence. If such a course is permitted to a plaintiff by the patent law it must lead to great oppression. This is no new device on the part of patentees, for of recent years it has been the practice, especially in chemical inventions, for patents to be taken out by foreign, mostly German, firms, and even by English manufacturers carrying on business in Germany or France. The patentees have no manufactories in England, but make everything abroad, being entirely foreign manufacturers. They take out an enormous number of separate chemical patents, and when they find a person in England in possession of a chemical article which they say infringes some of their patents, instead of suing the alleged infringer on the one, two, or three patents which he does in fact infringe, they sue him on the whole of their patents, with the result that, unless the defendant is a wealthy man, he cannot possibly bear the expense of defending the action, and is thus forced to submit to an injunction. Now, we submit that the Court should not countenance such oppression on a defendant, and that before the plaintiff can say to the defendant "You are infringing my patent," he should be in a position to prove the infringement, for the onus lies upon him, as upon the plaintiff in every other action, whether a patent action or not, to prove his case: he must prove it as regards the particular patent which he alleges has been infringed. He cannot combine, as has been done here, numerous separate causes of action, each one being on a separate patent. The only rule that allows a plaintiff to unite in the same action several causes

of action is Order XVIII., r. 1 (1); but the rule expressly provides that if the Court considers that any such causes of action cannot be conveniently tried together, it may order separate trials. Then rule 8 of the same order enables the defendant to apply to the Court for such an order, and rule 9 empowers the Court to order any such causes of action "to be excluded," and consequential amendments to be made. Then Order XIX., r. 27, empowers the Court to order to be struck out any matter in any pleading which may tend to "embarrass" the fair trial of the action. Upon those rules, taken together, we rely. To allow a plaintiff to combine several causes of action must tend to "embarrass" the defendant by putting him to great expense; and this is especially so in a patent action, for before putting in a defence at all he is bound to examine into the validity or invalidity of the patents in question.

Again, the plaintiffs' case is that the defendant has infringed "one or other" of their patents; but they do not deny that the patents may be divided into alternative groups; so that some at least of the causes of action must necessarily fail.

(1) The following Orders of the Supreme Court, 1883, were referred to in the argument:—

Order XVIII., r. 1: "Subject to the following rules of this order, the plaintiff may unite in the same action several causes of action; but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof."

Rule 8: "Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the Court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of together."

Rule 9: "If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or a judge that the causes of action are such as cannot all be conveniently disposed of together, the Court or judge may order any of such causes of action to be excluded, and consequential amendments to be made, and may make such order as to costs as may be just."

Order XIX., r. 27: "The Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client."

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The defendant is thus being put to the expense of getting out of the plaintiffs what their real cause of action is; whereas it is upon the plaintiffs that the onus lies.

[COZENS-HARDY L.J. referred to *Saccharin Corporation, Limited* v. *Quincey*. (1)]

That case has no bearing on the present, for there the validity of the patents was admitted; and it was also admitted in another action by the present plaintiffs, *Saccharin Corporation, Limited* v. *Dawson*. (2) In both cases the parties went to trial on infringement only, that being the sole issue. Neither case affects a case in which, as here, validity is challenged. Moreover, the plaintiffs were not suing on an expired patent, as they are doing here. The defendant's cross-examination has no bearing at all upon the present question, namely, whether the plaintiffs should be put to allege and prove which of these twenty-three patents has, as they say, been infringed. We submit that the plaintiffs should be put to elect to sue, in the first instance, upon a limited number of patents, and to state on which of their patents they intend to rely; and the Court will then exclude those causes of action on which the plaintiffs do not rely. Notwithstanding the difficulty they may be in—a difficulty of their own making, they having taken advantage of the patent law by taking out these numerous patents for their own protection—they are bound to specify and prove what cause of action they have against the defendant. It is oppressive on the defendant to send the case for trial upon several causes of action; and the Court should not, merely because this is a patent action, modify in favour of the plaintiffs what is the regular and ordinary practice of the Court.

Moulton, K.C., and *J. C. Graham*, for the plaintiffs. If the defendant will state how his infringing article is made, we will undertake to limit our claim to a certain number of the patents on which we are suing.

[COZENS-HARDY L.J. A plaintiff does not usually call upon a defendant to help his case.]

But a plaintiff can always get discovery from the defendant.

[COLLINS M.R. Have you any right to elicit from the defendant by what process he makes his article?]

(1) [1900] 2 Ch. 246; 17 Rep. Pat. Cas. 337. (2) 19 Rep. Pat. Cas. 169.

We submit we have: the knowledge that can limit the action is in the defendant, not in the plaintiffs. The Court will not refuse the plaintiff in a patent action the opportunity of defending his rights in the only way he can do so; and our only way here is to bring the action upon all our patents, since we do not know, and the defendant will not enable us to state, which of those patents he has infringed. If we were to sue separately upon each patent successively, we should inevitably fail, because we could not prove an infringement of any one patent in particular. So that the only way in which we can defend our rights is by suing upon all our patents; and if so, such a mode of proceeding cannot be regarded as in any sense oppressive. A patent is a thing open to the whole world, and there can be no difficulty in a man looking at it to see if it is valid or not. It is a common practice for English traders to import into this country goods manufactured abroad, trusting to the English Courts not being able by any method to discover the process of manufacture; but that is not the case here, for the defendant has in fact the knowledge of the process by which the infringing article is manufactured.

With regard to the two cases cited—*Saccharin Corporation, Limited* v. *Quincey* (1) and *Saccharin Corporation, Limited* v. *Dawson* (2)—in neither case did the Court interfere at the present stage of the proceedings; and we submit that the proper course is to wait and see first what the defence is. If the defendant says, "I have been selling sucramine manufactured only according to the Fahlberg process," we could then strike out several of the patents. If a pound of sucramine sold by him has been manufactured according to one or other of the three alternative processes other than Fahlberg's, then we must sue upon all three: we cannot defend ourselves otherwise, for we cannot tell from which batch of processes that particular pound came. We cannot make the litigation less costly unless the defendant assists us in doing so. Either the defendant must admit that the sucramine was made under the Fahlberg patent and the three other patents he mentions in his cross-examination, in which case we would limit our claim, or we should be allowed

(1) [1900] 2 Ch. 246; 17 Rep. Pat. Cas. 337. (2) 19 Rep. Pat. Cas. 169.

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to interrogate him as to those patents. We accordingly submit, first, that the application should stand over until the defence has been put in: or, secondly, that if the Court should be of opinion that our claims should be reduced before the defence is put in, we should be allowed to interrogate. The cross-examination of the defendant on his affidavit shews that his case is not a bonâ fide one, and it illustrates the advantage of further evidence being allowed on appeal in these cases.

Warrington, K.C., in reply. We rely strongly upon the ordinary practice which requires a plaintiff to establish his case against the defendant. It is for the plaintiff to allege and prove his case, and he is not entitled in any action, whether it be a patent action or any other, to allege a case and not establish it, and then to try and prove it out of the mouth of the defendant. The onus is on the plaintiff. Here the plaintiffs have alleged a case which they admit they cannot prove against this defendant. They have an independent remedy, if so advised, against the French manufacturers. That being so, this action should not be allowed to go on, at least in its present form.

COLLINS M.R. This is an appeal by the defendant asking that the claim in a patent case may be modified in such a way as to narrow the area covered by it. The plaintiffs' claim rests on no less than twenty-three patents. Now, on receiving the statement of claim in a patent action of this kind the defendant has to consider how he is to deal with it. Under s. 29, sub-ss. 2 and 3, of the Patents, Designs, and Trade Marks Act, 1883, the defendant here is bound, if he elects to dispute the validity of any of the twenty-three patents put in suit against him, with his defence to deliver particulars of objections to them. It is all very well for Mr. Moulton to say that a patent, as its name imports, is a thing open to the whole world, and that therefore it is the simplest thing possible to examine it and see if it is a valid patent or not; but when a defendant is charged, as he is here, with a breach of some one or more, or all of twenty-three patents, in common justice and in common sense he is obliged to look into them to see whether there is any ground for disputing their validity. Whatever may be the

process the defendant in a patent action is adopting in his own manufacture, he is entitled, if he can, to dispute the plaintiff's right to complain of it, and to say, "If your own patent is not valid you cannot complain, and therefore I must look into your position, and see whether your patent is valid or not before I can elect (as I must before delivering my defence) to take objection to it on the ground of validity." The defendant here says, "That is a very great burden to impose upon me; you, the plaintiffs, are bringing, in point of fact, twenty-three different actions against me, and you compel me at my own risk and expense to examine into all the grounds of those actions, and take up a position, which will be practically irrevocable, of admitting or denying the validity of those patents, and confining myself to disputing the infringement if so advised. That is not a burden which it is fair for you, the plaintiffs, to put upon me." The plaintiffs reply, "We are in very great difficulty in finding out which of our patents you are infringing by your product; and because we are in that difficulty our easiest course is to put them all together, and say we cannot point out under which of them your product has been made, but it must have been made under one of them." The plaintiffs thus endeavour to shift the onus on to the defendant of disproving their case; in point of fact, the plaintiffs, on whom the burden lies in this case, are inviting the defendant to come forward and shew that there is not a cause of action against him. Now that, to my mind, is a complete reversal of the true position. The burden of shewing that he has a cause of action lies upon the plaintiff in a patent case just as much as upon the plaintiff in any other case. It is upon him to shew that he has a cause of action by reason of the defendant having infringed his patent. He obtains certain privileges under the patent law by being the owner of the patent. That may involve also certain disadvantages, but he cannot, because he is placed in a difficulty by reason of the nature of the patent right or monopoly which the Legislature has given him, pray that in aid as a ground for imposing on a defendant a burden which the Legislature has not imposed upon him. That burden rests on the plaintiff, and there is machinery in these Courts by which within certain well-defined

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limits he can interrogate his opponent; and if and so far as the principles upon which procedure is regulated in this country do not enable him to make out his cause of action from the lips of the defendant, he must simply acquiesce in the burden that rests upon him. That is part of the law of the land; and if he cannot prove his case by the ordinary methods and within the rules the Courts impose, it is so much the worse for him; but the difficulty he is in is no reason whatever for throwing any additional burden on the defendant.

Now, we start here with a writ launched covering twenty-three causes of action. Primâ facie, in old days, one cause of action was thought to be enough. That was gradually more or less relaxed, and one cause of action was allowed to be coupled with one or two subordinate or necessarily connected causes of action. Then came, by the rules under the Judicature Acts, a still further relaxation, but always subject to the one underlying principle, namely, that the burden lay on the plaintiff of proving his case, and that no extra burden should be imposed on the defendant through the plaintiff needlessly enlarging the area of the dispute. Primâ facie a dozen causes of action cannot be combined in one writ: they must be so intimately connected as to justify their being included in one writ; but when one finds no less than twenty-three, that seems to me to be an outrageous extension of the latitude given by the rules to a plaintiff. In dealing with a patent case, instead of the incidents of a patent case being in favour of relaxing the rules, it seems to me that they are against doing so, because the plaintiff has had bestowed on him by the patent law this privilege, that when he has started an action, the defendant has to make up his mind whether he intends to dispute the validity of the patent, and, if he intends to do so at the trial, is compelled to take the initiative himself, and point out the different grounds on which he intends to object to the validity of the patent. Therefore, a very great burden is imposed on the defendant when the plaintiff has multiplied his causes of action. Here the plaintiffs have multiplied them to the extent of no less than twenty-three different causes of action. Now, it seems to me that the grounds on which

they justify this, when sifted, cannot be maintained. The plaintiffs start with this strong presumption against them—that twenty-three causes of action ought not to be embraced in one writ. When one analyzes their grounds for asserting in this particular case that they are entitled to do so, it seems to me, as pointed out by Mr. Warrington and Mr. Astbury, that their position is merely an incident of the special right which a patentee acquires under the patent law. He obtains certain privileges, and in this particular case the plaintiffs have been able to obtain, and, as they say, have been obliged to take out for their own protection no less than twenty-three different patents. That is a matter peculiar to themselves—a peculiar incident to the monopoly which they have acquired; and by reason of the very necessity of taking out successive patents they no doubt do find themselves in a difficulty when putting in suit their rights against any person—the difficulty of knowing whether that person does or does not infringe some or all and which of those patents. But that is not a difficulty that ought to be visited on the defendant. The defendant is entitled to carry on his business in this country unless and until the plaintiffs, as the persons having the monopoly, can shew that, in so carrying it on, the defendant has violated any of their rights. Therefore the Court cannot be asked to assist a plaintiff simply because he finds himself in a difficulty in proving his cause of action. That is the whole gist of the argument here on the part of the respondents to this appeal.

Now Mr. Graham has put the case very clearly indeed on behalf of the respondents, the plaintiffs. He says it is true that the plaintiffs have twenty-three different patents, and allege infringement of all of them; but he says the plaintiffs are in this difficulty—that if they were to commence an action on each of these patents in succession they must fail, because they could not, in any single case, prove that the defendant had infringed the particular patent upon which they were suing. If that be so, that is an unfortunate result; but it is, it may be, one of the incidents of the special form of privilege the plaintiffs have acquired on taking out their several patents.

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Now although this action is launched and made to appear on the writ as being based upon twenty-three separate causes of action—that is, twenty-three separate patents, all of which the defendant is alleged to have infringed, when we look into the facts as they appear upon affidavit, it turns out that the action does not allege the true cause or causes of action, that these twenty-three different patents cannot have been all infringed similarly by the same act, and that they are capable of being divided into groups, which are mutually exclusive. Accordingly, there is not really the justification in fact, even if the law admitted it, of treating this as an action on twenty-three different infringements by the defendant of twenty-three different patents. The result, therefore, seems to me to be this—that the plaintiffs are wrong in attempting to put this burden on the defendant; that it is one they have no right to impose upon him, and that this Court ought not to allow them to impose it upon him.

But the practical question then is, How is the matter to be dealt with? Primâ facie, if we were not dealing with a multiplicity of patents, one cause of action for one breach of one particular patent would be sufficient; but inasmuch as the plaintiffs claim that, having twenty-three patents, they are entitled to put more than one of them in suit at the same time, we think that, if at his option he picks out three patents, upon those he should be allowed to sue in the first instance. Of course that will not interfere with any right he may have to put the others in suit later on, but to embarrass a defendant by more than a very limited number of these patents would, to my mind, be obviously unfair. Perhaps, in fixing the number as high as three, we are putting quite as heavy a burden on the defendant as he ought to be called on to bear; but at the same time, to limit it to one, would, I think, in the circumstances of this case, be to limit the area of the discussion too far. I think justice will be done if an order is made under Order XVIII., r. 8, confining the action, in the first instance to any three of the patents which the plaintiffs may select, as being "such of the causes of action as may conveniently be disposed of together."

STIRLING L.J. I agree that an order should be made in the form proposed by the Master of the Rolls.

I wish, first of all, to refer to the order which was made by the Court of Appeal on the former occasion, and to which I was a party. It was suggested during the argument that that order is a precedent for similar cases. I desire, most emphatically, to say that, in my judgment, it is not. [His Lordship then pointed out that the order was made under special circumstances upon the suggestion of the appellant's counsel, and acceded to, without objection, by the respondents' counsel, and proceeded:—]

It was thought that was a mode of proceeding which would facilitate the further disposal of the appeal, and the appeal stood over in order that the defendant might make the affidavit and be cross-examined upon it. But it was never intended to decide, and the Court never expressed any opinion, that that was the proper course to pursue in the present case, still less in other cases as to which the facts may be different.

Now, upon the main question on this appeal, this action certainly strikes me as a very extraordinary one. Here we have a writ, and a statement of claim, alleging an infringement of no less than twenty-three patents, and when the plaintiffs' particulars are delivered the only specific instances of infringement that are given are a sale to one Booth on one occasion of "a quantity of sucramine," and of a sale to the same person on another occasion of "a pound weight" of that article. If the matter stood there, it would be almost impossible to believe that the statement of claim could be correct, that the sale of one pound of this particular article was an infringement of no less than twenty-three patents. But the matter does not rest there at all. Affidavits have been gone into on this question from which it quite clearly appears that it is not the fact that the sales complained of constitute an infringement of all of the twenty-three patents in question. It appears that the patents are capable of being grouped, and though it is possible that the sale may be an infringement of all the patents in one group, yet it cannot be in those circumstances an infringement of any patent in the other groups.

Now, I do not think that the mode of pleading adopted by

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the plaintiffs is really a fair mode of pleading in such a case as this. The case the plaintiffs set out with—and this is a possible cause of action—is this. They say there are various ways of making saccharin, but it cannot be made in any way which does not infringe some right of theirs, and they further say that although there are different modes of manufacture, yet that the ultimate manufacture itself is of such a nature that it is impossible by analysis, or without information as to the mode employed, to ascertain which group of patents has been infringed. There are at least two reported cases in which the plaintiffs have succeeded in different cases of this kind, but it does seem to me that the writ and statement of claim which have been issued and delivered in this case are not the proper mode of raising the question of infringement, and that to enable the Court to properly exercise its discretion as to the way in which such an action ought to be prosecuted, having regard to Order XVIII., the plaintiffs' case ought to be fairly pleaded. Now we have before us, in the affidavits that have been made, sufficient information as to the real case which is to be raised. I agree with what has been already said, that in this particular case the plaintiffs ought to be limited, in the first instance at all events, to selecting a certain limited number of patents, and prosecuting the action as regards those only; and no doubt, in selecting the particular patents upon which they would desire to found their case in the first instance, they may have regard to the information they have been enabled to acquire by means of the proceedings which have already taken place under the previous order of this Court.

COZENS-HARDY L.J. I agree. As I was a party to the former hearing of this case, I desire to say, with regard to the affidavit and the cross-examination upon it, that I entirely adopt what my brother Stirling has said. On that occasion we gave no decision at all upon the point. The order was purely a consent order, and it must not be taken as a precedent in any future case. Speaking for myself, in any case in which it might be deemed reasonable to exact from the defendant a statement by affidavit as to where and when he had acquired from abroad the alleged infringing article, I think it would be

only reasonable that the same rule should apply as exists with reference to affidavits of documents before trial, namely, that the statement must be treated as conclusive, and not subject to cross-examination at that stage of the action.

With reference to the main point I have very little to add. The action strikes me as almost an abuse of the process of the Court. The plaintiffs have not a patent for the particular article, saccharin. They have twenty-three patents, more or less, for different processes for making an article which any one may make, if he can, by some other and different process. To say that they can in one action combine those twenty-three separate causes of action is startling; and it is none the less startling when the plaintiffs themselves are bound to admit that it is impossible that the defendant can have been guilty of a breach of all the patents in respect of which they are suing. The plaintiffs say that they are in a great difficulty, because they cannot ascertain from the defendant that which the defendant says he does not know, namely, the process of manufacture. It may be sufficient to say that it is so much the worse for the plaintiff if by a known process of law he cannot obtain the evidence necessary to enable him to prove his case; but I may add, as was pointed out by Mr. Warrington in reply, it may well be that the plaintiffs have an independent and sufficient remedy against the French manufacturers, if the plaintiffs are advised to attempt to obtain an order for service out of the jurisdiction of the writ upon them.

I would only add this, that in the decision at which we now arrive there seems to me to be nothing inconsistent with *Quincey's Case* (1) or *Dawson's Case*. (2) In neither of those cases was there any such application before the Court as is made in the present case. No question of validity was, or could be, raised in those cases: the point before us was not before the Court in either case; and whether those decisions are right or wrong, they in no way interfere with the decision at which we arrive on the present occasion.

Solicitors: *James, Mellor & Coleman; J. H. & J. Y. Johnson.*

(1) [1900] 2 Ch. 246; 17 Rep. Pat. Cas. 337. (2) 19 Rep. Pat. Cas. 169.

G. I. F. C.

C. A.
1903
Feb. 4, 5.

JARED *v.* CLEMENTS.

[1901 J. 1377.]

Vendor and Purchaser—Equitable Mortgage—Notice—Fraud of Vendor's Solicitor—Legal Estate—Possession of Title-deeds—Forged Receipt—Priority—Liability as between two Innocent Persons.

A purchaser who has, before completion of his purchase, received notice of an outstanding equitable interest must, in order to get a good title from his vendor, take care to see that that interest is got in or destroyed. If he chooses to complete in reliance upon the assurance of the vendor, or of the vendor's solicitor, that the interest has been got in or destroyed, he does so at his own risk if it turns out that the interest is still outstanding, and the conveyance to him of the legal estate, accompanied by the delivery (unknown to the owner of the equitable interest) of the title-deeds, affords him no protection against the prior equitable interest.

Prior to the completion of a purchase of leaseholds the purchaser's solicitors discovered the existence of an equitable mortgage not disclosed by the abstract, and required it to be discharged. On completion of the purchase the vendor's solicitor, who was also the solicitor of the equitable mortgagee, produced the memorandum creating the equitable mortgage with what purported to be a receipt, signed by the mortgagee, for all moneys due on the security; an assignment of the property by the vendor to the purchaser, passing the legal estate, was then executed, and the equitable mortgage, the receipt, and all the other title-deeds, were handed to the purchaser. The receipt turned out to be a forgery, and on an action being brought by the equitable mortgagee against the purchaser to establish the priority of his charge:—

Held, affirming Byrne J., [1902] 2 Ch. 399, that as the defendant had purchased with notice of an incumbrance which, as a fact, was still subsisting, the legal estate and possession of the title-deeds afforded no protection, and that the plaintiff's equitable mortgage therefore had priority, and was still enforceable against the defendant.

APPEAL from the decision of Byrne J. (1)

The question was whether as between the plaintiff, an equitable mortgagee of leasehold property by memorandum of deposit, and the defendant, the purchaser of the property, both of whom had been defrauded by one Charles Parr, a solicitor, the legal estate and possession of the title-deeds by the defendant, the purchaser, gave him priority over the plaintiff, the equitable mortgagee, and so enabled him, the defendant, to

(1) [1902] 2 Ch. 399.

hold the property free from the mortgage. The existence of the equitable mortgage came accidentally to the knowledge of the defendant before completion of the purchase, but he accepted the assurance of Parr, who was the vendor's solicitor, that the mortgage had been paid off, that assurance being supported by the production by Parr of a document purporting to be a receipt for the mortgage money signed by the plaintiff, and which receipt Parr, on the completion of the purchase, handed to the defendant, together with the memorandum and the other title-deeds. The receipt, which was dated August 10, 1899, the date of completion, instead of stating in the usual form "This day received," stated "Received" only. The receipt turned out to be forged, and this led to the present action being brought by the equitable mortgagee against the purchaser to establish his priority. The facts are fully stated in detail in the report of the case below.

Byrne J., at the trial of the action, held that, under the circumstances, the plaintiff, the equitable mortgagee, had priority.

The defendant, the purchaser, appealed.

The appeal was heard on February 4 and 5, 1903.

Rowden, K.C., and *W. H. Cozens-Hardy*, for the defendant, upon the point that the defendant was protected by the possession of the legal estate, and that there had been no such negligence on his part to make inquiries as to deprive him of that protection, repeated their argument in the Court below, and cited the further cases of *Jolland* v. *Stainbridge* (1), *Le Neve* v. *Le Neve* (2), *Jones* v. *Powles* (3), and *Oliver* v. *Hinton*. (4) They further submitted that from the unusual form of the receipt—"Received" instead of "This day received" —it referred to a dead, not a living, charge; and accordingly that the inference should be drawn that it was intended as an acknowledgment that there had been a charge, but that

(1) (1797) 3 Ves. 478, 483; 4 R. R. 64.

(2) (1747) 2 W. & T. 7th ed. p. 175; Amb. 436; 3 Atk. 646; 1 Ves. Sen. 64.

(3) (1834) 3 My. & K. 581, 598; 41 R. R. 137.

(4) [1899] 2 Ch. 264.

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it had been paid off long before. They also contended that the memorandum of deposit did not operate as a charge because it did not describe the property, and that when, upon the completion of the purchase by Taylor, the original purchaser, the deeds were handed to his solicitor, Parr, he, Parr, held them as solicitor for Taylor, and not for the plaintiff, Jared, and that therefore any statement by Parr to Jared that he held the deeds as security for Jared was not a sufficient part performance to take the case out of the Statute of Frauds: *In re Beetham.* (1)

Norton, K.C., and *Method*, for the plaintiff, were not called upon.

COLLINS M.R. In my opinion, this appeal fails. The question is between the owner of an equitable charge, who has not been paid off, and the purchaser of the property, who has got the legal estate. Here we have to deal with a case of actual notice to the purchaser's solicitor of the existing equitable charge. That notice he received prior to August 10, 1899, the date of the completion of the purchase. Having received that notice under circumstances which I need not go into, the purchaser's solicitor entered into a correspondence with the vendor's solicitor and required that this equitable charge of which he had had notice should be paid off. [His Lordship read the correspondence, and continued:—]

Then came the date for completion, and there is produced and handed to the purchaser what purports to be the receipt by the person in whose favour the equitable charge had been given. Primâ facie that appears to be a receipt dated the day of completion. It has been argued on behalf of the appellant, the purchaser, that, having regard to the form of the receipt, his solicitor, although he had had notice of the equitable charge, must be treated as having had notice, in effect, that it had been paid off, and was therefore justified in thinking it was a dead charge, and that unless he was unreasonably negligent in the way he conducted the business the legal title of the purchaser must prevail. That argument seems to me

(1) (1886–7) 18 Q. B. D. 380, 766, 769.

to involve a misconception of the true rights of the parties. This is not a case of constructive notice raising the question whether all reasonable diligence was exercised to find out what might have been, but was not in fact, discovered. It is true that the learned judge has held that all due diligence was used by the purchaser's solicitor, and that there was no fault on his part; but, on the other hand, there is one broad fact underlying this case—that there was, in the course of this transaction, actual notice of an existing equitable charge upon the property. After that, it seems to me that if the purchaser chooses to complete without ascertaining for himself whether the charge has been paid off, he does so at his own risk. Having found out that the charge exists, he cannot set up the legal estate as an answer unless he gets rid of the incumbrance which he knows to exist. The result is that he takes the estate with the entire obligation existing under the equitable charge. It is not necessary in this case to consider whether reasonable diligence was in fact exercised by the purchaser's solicitor, but, speaking for myself alone, I should hesitate to say, under the peculiar circumstances of this case, that the solicitor had taken all reasonable care to see whether this equitable charge had been satisfied. We start with the fact that, until the discovery by the purchaser's solicitor in searching the proceedings in the bankruptcy of the mortgagor, no disclosure of this equitable charge was made by the person whose duty it was to have disclosed it. He, on being taxed with the existence of the charge, at once admitted it, although the purchaser and his solicitor had been allowed to remain in ignorance of it; and yet that was the person upon whose assurance the purchaser's solicitor subsequently, on the completion of the purchase, was content to rely. That point, however, does not arise in this case.

The result is that the actual notice which, it turns out, was not a notice of a dead charge, makes the risk fall upon the purchaser, and therefore the appeal fails.

I ought to add a word upon the other point pressed upon us by the appellant's counsel—that there was not such a deposit as complied with the requirements of the Statute of

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Frauds. It appears that the learned judge has found, as a fact, that there was an effectual charge, and, in my opinion, the evidence is entirely consistent with that view. This is not such a case as that of *In re Beetham* (1), which was cited, where a person in possession of deeds on behalf of a particular person says he will hold them as security for some other person, and nothing more is done—nothing more in fact than speaking a few words. There you have the very thing which the Statute of Frauds was intended to prevent. That is a totally different case from this.

ROMER L.J. I am of the same opinion. This is not one of those cases which so frequently come before the Court, in which the question is whether a legal mortgagee is or is not entitled to set up his legal mortgage as against an equitable mortgage on the ground of some fraud or negligence on the part of the legal mortgagee. Rightly understood, the question here is simply one of title and conveyance. The facts, put shortly, are these. A person contracts to purchase certain property. Before completion he is told of an equitable mortgage created some time before by his vendor. What is the position of the completing purchaser when he knows of this? He knows he cannot get a title from the vendor unless that outstanding equitable interest is got in or destroyed; and if he completes without that equitable interest being got in or destroyed, he can only take the property subject to that outstanding equitable interest. In order to get a good title, it is for him to see that the outstanding interest is got in or destroyed, unless indeed the owner of the interest has been guilty of some conduct which renders it inequitable or improper on his part to set up his outstanding interest against the purchaser. But that is not the case here. The owner of the equitable charge has done nothing of that sort. The purchaser might have asked that the equitable mortgagee should join in the conveyance. He might have gone himself to the equitable mortgagee and asked how matters stood; or he might have done what in fact he did, and asked the vendor to

(1) 18 Q. B. D. 380, 766.

get in the equitable interest. If he chooses to leave it to his vendor to get in the equitable interest or see that it is destroyed —however reasonable that course may seem to be—and the vendor does not do it, all I can say is that, under the circumstances, the purchaser, having left it to the vendor to do that which the vendor has not done, must suffer for it. He knew of the existence of the equitable interest and has not got it in, and therefore he takes the property subject to that interest, unless he can prove that he has got it in, or that the owner of the interest has lost his right. In my opinion, therefore, the learned judge was right, and the appeal must be dismissed.

COZENS-HARDY L.J. I am of the same opinion. The case seems to me, on the facts, to be a plain one. I do not base my judgment in the least upon any negligence on the part of the purchaser's solicitor or upon any fraud. This is one of those cases in which one of two innocent parties has to suffer for the fraud of a third person. When the facts are known, the case raises a simple question of conveyancing. There was clear notice to the purchaser of an equitable charge, and there was at that time no ground for presuming that the charge had ceased to exist; on the contrary, on completion two documents were handed over to the purchaser, one of them being the receipt dated August 10, 1899, the date of completion, and purporting to be signed by Jared, the equitable mortgagee, and the other being the memorandum of deposit that had been signed by Taylor, the vendor. It seems to me to be plain that it was the duty of the purchaser to get in or procure the discharge of the outstanding interest. The transaction does not, in its essence, differ in the least from that which the learned judge states, by way of illustration, in his judgment. (1) If the equitable mortgage to Jared had been recited in the conveyance, and Jared had been made a party, and Parr had, at completion, brought to the purchaser the deed actually signed by Taylor and also purporting to be signed by Jared, but not in fact signed by him, and the purchaser had accepted the deed on the assurance of Parr that Jared's signature was

(1) [1902] 2 Ch. 403.

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genuine, the position of the purchaser would have been clear. The present case in no way differs from that in principle. A purchaser who knows of an outstanding equitable interest which has to be got in to perfect his title, and on completion neglects to get in that interest, takes his conveyance at his own risk.

Solicitors: *Shepheards & Walters; Watson Dyer & Rydon.*

G. I. F. C.

C. A. 1903 *Feb.* 5.

VAN PRAAGH *v.* EVERIDGE.

[1901 V. 863.]

Vendor and Purchaser—Specific Performance—Mistake—Sale by Auction—Purchase of Wrong Lot—Consensus ad Idem—Contract—Wrong Date—Memorandum in Writing—Statute of Frauds (29 *Car.* 2, *c.* 3).

At a sale by auction of landed property on November 18, 1901, the defendant bid for one lot by mistake for another, and it was knocked down to him. On discovering his mistake he refused to sign the contract, whereupon the auctioneer signed it as his "agent."

The printed particulars, conditions, and annexed form of contract had been prepared for a sale on "October 17, 1901," which was postponed till November 18, but by inadvertence the original date, though altered in the particulars, remained in the conditions and form of contract:—

Held, that there was no contract within the Statute of Frauds, nor, *semble*, any consensus ad idem, to support an action by the vendor for specific performance.

Decision of Kekewich J., [1902] 2 Ch. 266, reversed.

APPEAL from Kekewich J. (1)

The action was by a vendor against a purchaser for specific performance of a contract alleged to have been entered into upon the sale by auction of a freehold house, the defendant having repudiated the contract on the ground that he had bid for the property by mistake. The facts are stated in the report of the case below.

Kekewich J. held that there was a binding contract, and gave judgment for specific performance. The defendant appealed.

(1) [1902] 2 Ch. 266.

Having regard to the course the case took on appeal, it should be stated that the contract, which was in printed form, contained several mistakes in date. In the first place it bore the printed date "October 17, 1901," which was not altered to "November 18, 1901," the actual date of sale. This mistake was due to the circumstance that the particulars and conditions of sale had been printed with a view to a sale on October 17, 1901, which was eventually postponed till November 18, and, although the date was altered in the particulars, the original date had by inadvertence been allowed to remain in the conditions and in the printed form of contract annexed thereto. Also the original date for completion, "November 21, 1901," was left in the conditions, with the requirement that the engrossment of the conveyance should be sent to the vendor's solicitors four days before that date.

The appeal was heard on February 5, 1903.

Stewart-Smith, K.C. (*Norman Craig* with him), for the defendant. Our defences are three in number: first, there was no consensus ad idem; secondly, there is no contract within the Statute of Frauds (29 Car. 2, c. 3); and, thirdly, this being a case of hardship, it is not one in which the Court will force specific performance on the purchaser, but will leave the plaintiff to damages.

Taking the second defence first, the mistakes in the dates in the conditions and the annexed contract are fatal to the plaintiff's case.

[ROMER L.J. The auctioneer had no authority to sign a document of "October 17, 1901"; accordingly, there is no contract within the Statute of Frauds. I do not myself, at present, see an answer to that.]

It is impossible to perform the contract, having regard to the dates fixed for completion and for sending the engrossment to the vendor's solicitors.

[He was stopped by the Court.]

Warrington, K.C., and *Frederic Thompson*, for the plaintiff. The real date of the contract was, as both parties were well aware, November 18, as stated in the particulars. "October 17"

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was a mere clerical error for "November 18." The parties were not really under any mistake as to the true date.

COLLINS M.R. The point now raised disposes of the case. The plaintiff cannot succeed without a contract. That contract must be evidenced by some memorandum in writing within the Statute of Frauds; and here there is no memorandum of that character.

Upon the supplemental point, as to whether the parties were ad idem, it is not clear to my mind that the parties ever were ad idem; I do not think they were, but it is unnecessary to say anything further about that, as the plaintiff's case fails on the other point. The appeal must, therefore, be allowed.

ROMER L.J. I agree.

COZENS-HARDY L.J. I agree. Kekewich J. says that the date appearing on the face of the printed form of contract was "not a substantial error." With that I cannot agree. The contract so dated purported to impose very substantial conditions; and, moreover, some of the conditions are impossible of performance.

Solicitors: *Edward Chester; Law & Worssam.*

G. I. F. C.

FINCHLEY ELECTRIC LIGHT COMPANY *v.* FINCHLEY URBAN DISTRICT COUNCIL.

C. A. 1903 Feb. 11.

[1901 F. 1470.]

Street—Urban Authority—Vesting—Road originally acquired by Turnpike Trustees—Overhead Wires—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 149.

Under s. 149 of the Public Health Act, 1875, which provides for the vesting in the urban authority of the streets within their district, the question how much above and below the surface of the street vests in the urban authority is determined by reference to what is necessary for the user of the street quâ street, without regard to the circumstances under which the site of the street was originally acquired.

Where, therefore, the site of a street which ultimately vested in the defendants as the urban authority under this section was originally conveyed to turnpike trustees in fee simple for the purposes of making a road under the Turnpike Roads Acts :—

Held, that the property of the defendants in the site of the street was not thereby enlarged, so as to entitle them to prevent electric wires being carried over the street at a height above the area required for the user of the street.

Decision of Farwell J. reversed.

THIS was an appeal from a decision of Farwell J. (1)

The plaintiffs were a limited company, having for one of their objects the supply of electricity in the district of Finchley. They had not obtained any statutory authority for that supply. The defendants were the urban district council for the district of Finchley; they had obtained a provisional order from the Board of Trade empowering them to undertake the supply of electricity within their district, but they had done nothing under the order except acquiring a site for a generating station.

The plaintiffs on October 1, 1901, carried two wires across a road in the defendants' district called Regent's Park Road, at a height of thirty-four feet, for the purpose of supplying electricity to a customer. The defendants cut the wires, and threatened to cut any wires which the plaintiffs should carry

(1) [1902] 1 Ch. 866.

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over any street within their district. The plaintiffs brought this action for an injunction and damages. By their defence the defendants alleged that the site of the Regent's Park Road was vested in them in fee simple, and by a rejoinder delivered in February, 1902, they disclaimed any intention to prevent the plaintiffs carrying wires over any roads the fee simple of which was not vested in the defendants.

Regent's Park Road was originally constructed by turnpike trustees appointed under a local Act of Parliament passed in 1826 (7 Geo. 4, c. xc.). The site or part of the site of the road at the point where the plaintiffs' wires crossed it was originally glebe land, and was on November 7, 1828, conveyed to the trustees in fee simple by the rector of the parish under the powers of the Turnpike Roads Act, 1822 (3 Geo. 4, c. 126). (1)

The turnpike-gates had been subsequently removed, and the road had become a highway repairable by the inhabitants at large.

The title of the defendants depended upon s. 149 of the Public Health Act, 1875, which enacts that "all streets, being or which may at any time become highways repairable by the inhabitants at large within any urban district, and the pavements stones and other materials thereof, and all buildings implements and other things provided for the purposes thereof, shall vest and be under the control of the urban authority."

Farwell J. was of opinion that under s. 149 of the Public Health Act, 1875, that which was vested in the urban authority under the word "street" was so much of the soil of the street as was required for the purposes of the street under the particular circumstances of the given case, and, having regard to the fact that the site of the road in question was conveyed to turnpike trustees in fee simple under the powers of the Turnpike Act, 1822, for the purposes of the road, he held that the whole estate of the trustees vested in the urban authority, and that they were entitled to prevent the electric wires being carried over the road at any height whatever, and he dismissed the action, but under the circumstances without costs.

The plaintiffs appealed.

(1) See [1902] 1 Ch. at p. 867.

Buckmaster, K.C., and *W. Mackenzie*, for the plaintiffs. It is settled by the authorities that s. 149 of the Public Health Act, 1875, was not intended to give to the urban authority anything beyond the surface of the street, and so much above and below as was necessary for the discharge of their duties. *Wandsworth Board of Works* v. *United Telephone Co.* (1), where the Court adopted the construction put upon the section in *Coverdale* v. *Charlton* (2), is conclusive against the defendants.

[They were stopped.]

Lyttelton Chubb (*Upjohn*, K.C., with him), for the defendants. The cases cited are distinguishable, and depend upon the principle that the Legislature cannot have intended to take away from private owners without compensation anything more than was necessary for the use of the street as a street. In all the cases upon this section the question has been how much has the Legislature taken away from the private owner: *Tunbridge Wells Corporation* v. *Baird*. (3) But here there is no question of private ownership. The land was acquired by turnpike trustees for the making of the road. The section gives to the urban authority all such right as was previously vested in the public. What is vested is the streets, as they had been used as streets before the Act came into operation, and where, as here, the fee simple has been acquired under the Turnpike Roads Acts for the purposes of the road the whole estate passes to the urban authority, and they are entitled to everything above and below the surface.

COLLINS M.R. This is an appeal from a decision of Farwell J., who has held, with regard to a portion of a street called Regent's Park Road, that, owing to the peculiar circumstances under which the land forming that part of that street was originally acquired, the local authority have acquired, under s. 149 of the Public Health Act, 1875, a right to a much larger interest in the land than they would have done had it been an ordinary street.

Now the basis of Farwell J.'s decision, as I understand it,

(1) (1884) 13 Q. B. D. 904. (2) (1878) 4 Q. B. D. 104.
(3) [1896] A. C. 434.

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is this. Regent's Park Road is made up of two strips, one strip having become a street in the ordinary way, the other having been formerly part of a turnpike road. It had been acquired by turnpike trustees under the Turnpike Roads Act, 1822, for the purposes of the road, and the fee simple was conveyed to them. The road ceased afterwards to be a turnpike road, and became a highway repairable by the inhabitants at large. The land having been acquired by the trustees in fee simple, and being no longer required by them for the purpose of a turnpike road, the question where the beneficial ownership of the soil is may be doubtful. The trustees still remained, and, so far as I know, still remain, the legal owners of that which they bought. That is the position of that part of the street. Then the local authority come in under s. 149 of the Public Health Act, 1875. There is no doubt that this street had become a highway repairable by the inhabitants at large, and therefore the right conferred by s. 149 upon the local authority existed. That right is that the street and the pavement, stones, and other materials thereof, &c., shall vest in and be under the control of the urban authority. It has been decided by a long series of cases that the word "vest" means that the local authority do actually become the owners of the street to this extent: they become the owners of so much of the air above and of the soil below as is necessary to the ordinary user of the street as a street, and of no more. For example, they do not take that part of the subsoil which has to be used for the purpose of laying sewers. That point was clearly decided by the House of Lords in the case of the *Tunbridge Wells Corporation* v. *Baird* (1), where the question was whether, by virtue of the vesting of the street, the local authority were entitled to make underground lavatories and conveniences. It was contended that this was a sort of use which a public authority might properly make of a street, but it was held that that was going beyond the ordinary use of a street quâ street. Their Lordships arrived at that conclusion in accordance with the principle laid down by a line of cases beginning with *Coverdale* v. *Charlton* (2), that, in construing an

(1) [1896] A. C. 434. (2) 4 Q. B. D. 104.

Act of Parliament which confers a right upon a public authority for which they do not pay, the Court gives the best effect to the intention of the Legislature by limiting the right to the area which is necessary to enable them to perform the duties imposed upon them in respect of the street as a street. There was a great deal of controversy as to what area was embraced under that definition, and in the case of the *Wandsworth Board of Works* v. *United Telephone Co.* (1), in the Court of Appeal, Brett M.R. and Bowen and Fry L.JJ. gave very elaborate descriptions of what in their judgment was covered by the words in the section. The result of those judgments appears to me to be this—that that which is vested in the local authority is what is called the area of user. The question was there considered how far it might be reasonably presumed that the column of air above the surface of the street came within the area of user, and fire-escapes were referred to as being the highest things to which the ordinary user of a street extended. The conclusion to be derived from the authorities seems to me to be this: all the stratum of air above the surface, and all the stratum of soil below the surface which in any reasonable sense can be required for the purposes of the street as street, vest in and belong to the local authority.

That being the law, which is settled, as it seems to me, beyond all controversy by numerous decisions culminating in *Tunbridge Wells Corporation* v. *Baird* (2) in the House of Lords, it is said that in this particular case the local authority got something more than that: that they got the soil below the street usque ad inferos and the column of air above usque ad cælum. Farwell J. has adopted that conclusion, and I am sorry to say that, great as is the respect which I have for the opinion of that learned judge, and great as is the diffidence with which I venture to differ from him, I am unable to follow his reasoning in this particular case. His reasoning is this. The turnpike trustees have been authorized by Act of Parliament to acquire this land in fee simple for the purposes of their road; therefore it must be taken that that was, as it were, a parliamentary declaration that the whole of the soil,

(1) 13 Q. B. D. 904. (2) [1896] A. C. 434.

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the fee simple, was necessary for the purposes of the road; and because it must be assumed that the trustees required the soil usque ad inferos for the purposes of their road, therefore the effect of s. 149 of the Public Health Act is that there vests in the defendants all that was acquired by the turnpike trustees, notwithstanding the decisions which shew how much the urban authority are to get under that section, having regard to the fact that they get it compulsorily and without paying for it. It seems to me that the standard which determines this question is, not how much the owner has to give, but how much the local authority under the Public Health Act have the right to take. It does not seem to me that that which is given to them by the Act of Parliament by virtue of their position becomes any larger or any smaller by reference to the ownership of the soil below. That ownership may be in one owner or it may be in twenty, but the local authority take what they want and no more. To say that because the soil is owned by somebody who cannot point to the particular persons who are beneficially interested in it, therefore the public authority under this section get more than they would get in a case where the beneficial owner could be identified, appears to me to be incapable of logical justification. I hope I am doing no injustice to the view of the learned judge, but, so far as I can understand it, that is the principle on which he went. He says (1): "It appears to me that the Act of Parliament, when it says that the streets or roads shall vest in the local authority, has said that so much of the land as is required for the purpose of the road shall vest in them, and further that when another Act of Parliament has authorized trustees to acquire land in fee simple for the purposes of the road, it is impossible for any Court to say that the whole fee simple was not so acquired and required. Consequently in this particular case I have referred to the circumstances of the case, as did all the Courts in the cases that have come before them heretofore. They have seen what was required for the purposes of the road. I have got something more than physical requirements, because I have got the Act of Parlia-

(1) [1902] 1 Ch. 873.

ment authorizing the acquisition for the purposes of the road, and, that being so, it appears to me I am bound to say that this land was acquired and required for the purposes of the road." Therefore he makes the standard what was the purpose for which the original owners acquired the land, and how much they got when they acquired it. I cannot agree with that view.

The particular point here is that the plaintiffs are an electric lighting company without any statutory powers, and they put up their wires at a point which it is admitted is outside what I have called the area of user of the street. If the defendants are obliged to rely upon the decision in *Coverdale* v. *Charlton* (1), and to measure their rights by the standard laid down in that and the succeeding cases, they admit that these wires do not encroach upon that area. They rest their case on the ground, as I have said, that, owing to the peculiar circumstances under which the soil of this road was held before they got it, they have got something more than they could have got under the ordinary law. Therefore we are dealing with a case in which the wires in question are clearly outside the area of user, and the right to interfere with them must be justified by ownership in fee. For the reasons which I have given I think that that is not a reasonable contention, and that the appeal must be allowed.

ROMER L.J. I am of the same opinion. The defendants can only claim that the road in question here became vested in them in the full sense in which they seek to maintain that it has been vested in them by relying on s. 149 of the Public Health Act, 1875. Now that section has received by this time an authoritative interpretation by a long series of cases. It was not by that section intended to vest in the urban authority what I may call the full rights in fee over the street, as if that street was owned by an ordinary owner in fee having the fullest rights both as to the soil below and as to the air above. It is settled that the section in question was only intended to vest in the urban authority so much of the actual soil of the

(1) 4 Q. B. D. 104.

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street as might be necessary for the control, protection, and maintenance of the street as a highway for public use. For that proposition it is sufficient to refer to what was said by Lord Halsbury L.C. and by Lord Herschell in *Tunbridge Wells Corporation* v. *Baird*. (1) Therefore s. 149 was only intended to vest in the urban authority certain physical property, a certain limited physical part of the street, and what that physical part is I have already stated. That section has nothing to do with title; it is not considering a question of title. No matter what the title is of the person who owns the street, the section is only considering how much of the street shall vest in the urban authority, and, accordingly, it is immaterial whether the owner of this street at the time of vesting was a private owner, or a trustee for a private owner, or a trustee for a charity, or a trustee for a turnpike trust, or for any other object. The question of title in reference to questions under s. 149 of the Public Health Act, 1875, is wholly irrelevant.

That really concludes this case; but I will add a few words with respect to the view which appears to have been taken by my brother Farwell in regard to this case as shewing how he arrived at the conclusion which he has arrived at. If I rightly understand him, he says, in the first place, that inasmuch as the turnpike trustees got their portion of the road in question on which the case turns in trust for making the turnpike road, or for throwing it into the turnpike road, and for that purpose acquired the full fee, if I may use that expression, it follows that the whole fee is necessarily to be vested in the urban authority. But, with great respect, I do not think that that is a right deduction. It might well be that under the Turnpike Roads Act in question it was necessary for the turnpike trustees to acquire the full fee, possibly because the owners would not part with anything less than the full fee; but beyond that the reason why the turnpike trustees had to buy this portion of the road was, to follow the words of the Act, "for the purpose of widening, diverting, altering, and improving" the road. Those are not the purposes for which

(1) [1896] A. C. 434.

streets are to vest in the urban authority under s. 149 of the Public Health Act. As I have pointed out, only so much is to vest as is required for the purposes of control, protection, and maintenance of the street as a highway for public use. This street, or this portion of the street, physically does not differ from any other street. There is nothing peculiar about this portion of the street which requires more of it to vest for the control, protection, and maintenance of the street than in the case of any other street. That being so, I respectfully think that my brother Farwell, in basing his judgment upon the ground which I have stated, has not come to a sound conclusion. As I gather, he has also taken another point, which is this. He has pointed out that if there is a legal estate outstanding, as there must be, in the representatives of the old turnpike trustees, it is difficult to say for whom the holder of that legal estate is a trustee, and, therefore, he seems to suggest that the legal estate may be, or ought to be, held in trust for the local authority. But it appears to me that, if the local authority want to make out that the legal estate is held in trust for them, the onus is upon them to do so, and they certainly have not discharged it. Nor can the legal estate be said to be outstanding in trust for the public, whatever that may mean. If the legal estate were outstanding in somebody in trust for the public, I cannot see how the local authority here can be identified for that purpose with the public. The local authority want nothing but what they have got under s. 149, and have got nothing in them beyond what is conferred by that section, and how that is limited I have already shewn. It appears to me, therefore, that the judgment of the Court below is not correct, and that the appeal must be allowed.

COZENS-HARDY L.J. I agree. It seems to me that the judgment under appeal can only be supported on the ground that everything acquired by the turnpike trustees under the deed of 1828 has vested in the defendants. I look in vain to discover any section in the Public Health Act having that operation and effect. The only section relied on is s. 149.

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That section fixes the subject-matter which is vested by reference to what is required for the ordinary user of a street as a street. It is wholly irrespective of the title to the stratum of air above the street, or to the subsoil below. That is the meaning of s. 149 according to the decisions of all the Courts. I think, therefore, that this appeal should be allowed.

Solicitors: *Benham & Meyer; A. M. M. Forbes.*

H. B. H.

C. A. 1903 *Feb.* 21.

In re DRUITT. DRUITT *v.* DEHLER.

[1902 D. 1031.]

Trustee—Authorized Investment — Stock of Municipal Borough — Limit of Population—Returns of last Census—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 1 (*m*).

In the returns of the census, taken in April, 1901, it is stated that the population of the borough of Bournemouth was 47,003. But in a note at the foot of the page it is stated that, by an order of the Local Government Board, which came into operation on November 9, 1901, the borough was extended so as to embrace two specified urban districts and parts of two other parishes, and that the figures at the date of the census were for Bournemouth 59,762:—

Held, that under s. 1 (*m*) of the Trustee Act, 1893, trustees were authorized to invest in stock issued by the corporation.

Decision of Joyce J. reversed.

APPEAL from a decision of Joyce J.

The trustees of the will of Richard Druitt, deceased, took out a summons asking for a declaration that Bournemouth Corporation 3 per cent. redeemable stock is a "trust investment" coming within the terms of s. 1 (*m*) of the Trustee Act, 1893, and that the trustees were at liberty to invest some trust money which was in their hands in the purchase of that stock.

By the Blue-book containing the returns of the Census of 1901 it appears, in the body of Table IX. for the county of Hants, that the population of Bournemouth was when that census was taken in April, 1901, 47,003; but in a note at the foot of the page it is stated that, by a Local Government Board

order, which was confirmed by the Local Government Board Provisional Order Confirmation (No. 7) Act, 1901, and came into operation on November 9, 1901, the county borough of Bournemouth was extended so as to include the urban districts of Pokesdown and Winton and parts of two other parishes, and it is added, "The figures at the date of the census were as follows: Bournemouth C.B., 59,762." Joyce J. held that the stock did not come within s. 1 (*m*) (1), and that the trustees were not at liberty to invest in it. The beneficiaries under the will appealed.

Rowden, K.C., and *Charles Church*, for the appellants. It is submitted that the investment is authorized by s. 1 (*m*). (1) The returns of the last census prior to the date of investment do in fact shew that the population of the borough exceeded 50,000. The facts were not fully brought before the learned judge.

Younger, K.C., and *Underhill*, for the trustees, submitted the question to the Court.

COLLINS M.R. In my opinion the conditions imposed by sub-s. (*m*) of s. 1 are satisfied. According to the returns of the last census the population of the borough exceeds 50,000, and we need not go outside the census returns to find that that is so. All the conditions of sub-s. (*m*) of s. 1 of the Act have been fulfilled. There must be a declaration that this stock comes within s. 1 (*m*), and that the trustees are at liberty to invest in it.

ROMER L.J. and COZENS-HARDY L.J. concurred.

Solicitors: *Lovell, Son & Pitfield, for Druitt & Druitt, Christchurch.*

(1) By s. 1, "A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following—that is to say" (inter alia) "(*m*) in nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding 50,000, or by any county council, under the authority of any Act of Parliament or provisional order." By s. 2, sub-s. 1, this power is made applicable to redeemable stock.

W. L. C.

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In re GOSSLING.
GOSSLING *v.* ELCOCK.

[1893 G. 785.]

Will—Construction—Residue to Individuals in Shares at Twenty-one—Maintenance Clause—Income for Maintenance of All—Vested or Contingent.

It is now a well settled rule of construction that, where there is a gift by will of a share of residue, to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for his maintenance, the share is vested and not contingent.

A testator gave his residuary estate in trust to pay and transfer the same unto and equally between his two children, a son and daughter, on their severally attaining twenty-one, the income "during their respective minorities" to be applied in or towards their maintenance, with a power for the trustees at any time during the "respective minorities" of his said two children to advance any portion "of his or her presumptive share" in or towards "their" advancement in the world:—

Held, upon the construction of the will, that the income of each share was to be applied separately for the maintenance of the child entitled to that share, and not indiscriminately in respect of both shares, and therefore that, according to the rule above stated, each child took an immediate vested interest in his or her share.

Decision of Swinfen Eady J., [1902] 1 Ch. 945, reversed.

APPEAL from Swinfen Eady J. (1), where the facts are stated.

The question was purely one of the construction of a peculiar will—whether, where the testator had clearly given his residuary estate to his two children, a son and a daughter, in equal shares upon their severally attaining twenty-one, a direction that the income of the shares should be applied for the maintenance of the legatees during their respective minorities meant that it should be applied for the maintenance of both legatees indiscriminately, or whether it meant that the two shares were to be kept separate and distinct for all purposes, including the application of the income of the respective shares for maintenance until twenty-one, in which

(1) [1902] 1 Ch. 945.

latter case it was conceded that according to the well settled rule each legatee would take an immediate vested interest. The question arose in consequence of one of the legatees, the son, who was illegitimate, having died under twenty-one.

Swinfen Eady J. held that it was the whole income which was given for the maintenance of the two children during their minority, and not the income of a moiety of the fund during the minority of each child for the maintenance of the same child, and consequently that the rule did not apply so as to give the deceased son, John Tom Gossling, a vested interest.

The Attorney-General and the Solicitor to the Treasury, who represented J. T. Gossling's share, appealed.

R. J. Parker, for the appellants, contended that the maintenance clause should be construed as referring to the income of each share separate and distinct from the other, and that, therefore, according to the rule, J. T. Gossling took an immediate vested interest in his moiety. [He referred to *Hanson* v. *Graham* (1) and *Boraston's Case*. (2)]

L. Vernon Harcourt, for the next of kin of a deceased legitimate child of the testator, contended that the income was given indiscriminately for the maintenance of both legatees, and that the rule as to immediate vesting only applied where there was an explicit appropriation of the income of each legatee's share to the maintenance of that particular legatee. [He referred to *In re Martin* (3), *In re Morris* (4), *In re Tredwell* (5), *In re Palmer* (6), *Fox* v. *Fox* (7), *In re Parker* (8), *Skey* v. *Barnes* (9), and *Hardcastle* v. *Hardcastle*. (10)]

G. Henderson, for the trustee of the will.

COLLINS M.R. I think the terms of this particular will leave no reasonable ground for doubt as to the construction of the clause in question upon the only point in the case, and that

(1) (1801) 6 Ves. 239; 5 R. R. 277.
(2) (1587) 3 Rep. 19 a.
(3) (1887) 57 L. T. 471.
(4) (1885) 33 W. R. 895.
(5) [1891] 2 Ch. 640, 653.
(6) [1893] 3 Ch. 369, 373.
(7) (1875) L. R. 19 Eq. 286.
(8) (1880) 16 Ch. D. 44.
(9) (1816) 3 Mer. 335; 17 R. R. 91.
(10) (1862) 1 H. & M. 405.

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is whether the testator intended that the income of the aliquot share coming to the particular child should be payable for the maintenance of that child until he or she attained the age of twenty-one. It seems to me that that is the true construction of this clause. [His Lordship then read the maintenance and advancement clauses, and commented on the words used, and concluded as follows:—]

The conclusion at which I certainly arrive upon the construction of this will is that the two children were intended to have the income, not indiscriminately of the whole, but only, in each case, of their aliquot shares during their minority. If that be the true view, there is no further difficulty in the case, because it is admitted that the rule in *Hanson* v. *Graham* (1) applies. For these reasons, with the greatest possible deference to my brother Swinfen Eady, I think this appeal must be allowed.

ROMER L.J. I agree. We are really not differing from my brother Swinfen Eady on any question of principle, but simply on a small point concerning the construction of a very peculiar will. The point arises on the precise words of this will, which is not like any other will that I have seen or am likely to see again. I come to the conclusion, with the Master of the Rolls, that this maintenance clause did intend to keep the two shares separate in the sense that it was not the object of the maintenance clause to make the two shares one so that the income arising from the one share could be appropriated to the maintenance of the child that might be or was entitled to the other share. On the very peculiar wording of this will, the conclusion I come to is that the testator intended that the two shares should be kept perfectly distinct, both for the purpose of maintenance and the purpose of advancement. That being so, I think the principle recognised by my brother Swinfen Eady applies, and that the shares are vested. Beyond question, if a share of a residuary estate is given to a person, to be paid or transferred to that person on attaining a particular age, and there is a maintenance clause providing for maintenance in the

(1) 6 Ves. 239; 5 R. R. 277.

meantime out of the income of that share, then the share is vested. (1)

COZENS-HARDY L.J. I agree, and for the same reasons.

Solicitors: *Solicitor to the Treasury; Bird & Eldridges, for Moore, Rawlins & Vores, Lymington, and for Burt & Haviland, Christchurch.*

G. I. F. C.

In re MAUNDER. MAUNDER *v.* MAUNDER.

[1902 M. 44.]

Will—Construction—Substitutional Gift—Death "before becoming entitled" to a Share—Entitled in "Possession" or in "Interest."

In a substitutional gift in a will "in the event of either of my grandchildren dying before becoming entitled to any share of my estate":—

Held, upon the construction of the will, without reference to any authorities, that "becoming entitled" meant becoming entitled in possession, not becoming entitled in interest.

Decision of Joyce J., [1902] 2 Ch. 875, affirmed.

APPEAL from the decision of Joyce J. (2)

A testatrix, by her will dated July 5, 1889, devised all her real estate, and bequeathed all her personal estate, to trustees, upon trust for her son Robert for his life, and on his decease she devised various freehold properties specifically to her respective grandchildren, the children of Robert, absolutely. The will continued as follows: "If there shall be any residue of my trust estate not disposed of, I direct my said trustees to pay the income thereof to my said son's wife for her life, and after her death to realize such residue and divide the net proceeds amongst all the children of my said son. And in the event of either of my grandchildren dying before becoming entitled to any share of my estate hereinbefore in any way

(1) See *In re Hart's Trusts*, (1858) 3 De G. & J. 195; *In re Bunn*, (1880) 16 Ch. D. 47; *Scotney* v. *Lomer*, (1885) 29 Ch. D. 535; (1886) 31 Ch. D. 380; *Brennan* v. *Brennan*, [1894] 1 I. R. 69.

(2) [1902] 2 Ch. 875.

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disposed of, I direct that the child or children of such deceased grandchild shall take the parent's share, or, if there shall be no such child or children, then that such share or devise or bequest hereinbefore contained shall vest equally in all my surviving grandchildren."

The testatrix died in 1891, leaving her son Robert, and eight grandchildren, his sons and daughters, surviving her.

Upon a summons to determine the construction of the above clause, Joyce J. held that "dying before becoming entitled" meant dying before becoming "entitled in possession," and that the substitutional clause would operate in the event of the death of a grandchild during the life of the tenant for life, the shares of the grandchildren not being indefeasibly vested on the death of the testatrix.

One of the grandchildren appealed.

Warrington, K.C., and *George Cave*, for the appellant, referred to the cases which were cited in the Court below.

P. F. Wheeler, for a great-grandchild of the testatrix, was not called upon.

Manby, *Gatey*, and *W. H. Cozens-Hardy*, for the other parties.

COLLINS M.R. Upon the construction of this will I think it is clear that the decision of Joyce J. was right. The clause by which the testatrix directs that after the death of her son's wife the residue is to be divided "amongst all the children of my said son" includes grandchildren who may be born after the death of the testatrix, and this, as my brother Romer L.J. pointed out during the argument, shews that the words "dying before becoming entitled" cannot mean only dying before the testatrix, but must mean dying during the life of the tenant for life. The appeal must be dismissed.

ROMER L.J. and COZENS-HARDY L.J. concurred.

Solicitors: *Oldfield, Bartram & Oldfield; Leslie Antill & Arnold; Marshall & Co.; Young & Sons.*

W. L. C.

SCOTT *v.* COULSON.

KEKEWICH J.

1903

Jan. 20.

[1902 S. 1982.]

Contract—Mistake—Sale of Life Policy—Death of Assured before Contract—Common Mistake—Rescission after Completion.

A contract for the sale of a life policy was entered into by both parties in the belief that the assured was alive, whereas he was in fact then dead. The contract was subsequently completed by assignment:—

Held, that the vendors were entitled to have the transaction set aside notwithstanding that it had been completed by assignment.

By a contract in writing dated March 19, 1902, the plaintiffs agreed to sell to the defendants Coulson and Bevis for the sum of 460*l.* a policy of assurance for 500*l.* on the life of Alfred Timothy Death, effected with the Scottish Widows' Fund and Life Assurance Society.

The plaintiffs became entitled to the policy as the executors of the will of J. W. Prior, deceased.

The purchase-money was paid, and the assignment of the policy by the plaintiffs to the defendants was completed by a deed dated April 10, 1902, but executed on April 19, 1902.

At the date of the contract it was believed by both the plaintiffs and defendants that A. T. Death was alive; but he in fact died on December 23, 1899, and upon his death there became due under the policy the sum of 777*l.* 10*s.* 4*d.*, which had since been paid into court by the assurance society.

There was evidence shewing that the contract price was determined by reference to, and was slightly in excess of, the surrender value of the policy. It appeared that in the interval between the date of the contract and the date of the assignmen the defendant Coulson had received information which led him to believe that the assured was dead at the date of the contract; that he had undertaken to communicate to the plaintiffs' agent any information which he might receive as to the existence of the assured, and that he had not thought it necessary to disclose this information to the plaintiffs or thei agent.

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This action was brought claiming that the assignment of April 19, 1902, should be set aside on the ground of common mistake.

Warrington, K.C., and *Harry Dobb*, for the plaintiffs. This is a clear case of a common mistake, both parties having entered into the contract on the basis that the assured was alive, and in ignorance of the fact that he was dead. The transaction, therefore, ought to be set aside: *Colyer* v. *Clay* (1); *Pritchard* v. *Merchant's and Tradesman's Mutual Life Assurance Society* (2); *Cochrane* v. *Willis*. (3) The observations of Hannen J. in *Smith* v. *Hughes* (4) and the summarized statement of the law in Pollock on Contracts (7th ed.), pp. 494, 495, are directly applicable to the present case. The circumstance that the defendants knew of the death of the assured before completion and did not disclose the fact affords an additional ground for relief.

Stewart-Smith, K.C., and *St. John Clerke*, for the defendants. The Court will not set aside a contract on the ground of mistake after completion. There is no authority for the exercise of such a jurisdiction. *Colyer* v. *Clay* (1) is not in point; there the contract was executory, and the Court, in the exercise of its discretion, refused specific performance. *Cochrane* v. *Willis* (3) was to the same effect, and carries the matter no further. In *Pritchard* v. *Merchant's and Tradesman's Mutual Life Assurance Society* (2) the question was simply one of construction: see observations on that case in *Stuart* v. *Freeman*. (5) The contract was entered into with perfect fairness, and the error made is not sufficient to justify rescission: *Debenham* v. *Sawbridge*. (6) When once the contract of purchase was concluded, the defendants were under no obligation to make any disclosure.

KEKEWICH J. This case raises a question of law of some interest. It is common ground that at the date of the contract

(1) (1843) 7 Beav. 188.
(2) (1858) 3 C. B. (N.S.) 622; 27 L. J. (C.P.) 169.
(3) (1865) L. R. 1 Ch. 58.
(4) (1871) L. R. 6 Q. B. 597, 611.
(5) [1903] 1 K. B. 47.
(6) [1901] 2 Ch. 98.

for sale of this policy both parties to the contract supposed the assured to be alive, the result being that the plaintiffs were willing to accept as the best price they could get for the policy a sum which was slightly in advance of the surrender value to be obtained from the assurance office, and very much below the sum due on the death of the assured. As a matter of fact the assured was dead. The parties, therefore, acted under a common mistake. In *Smith* v. *Hughes* (1) Sir James Hannen has defined what is the common mistake which will justify one party to a contract in refusing to perform it. There the plaintiff had sold oats to the defendant by sample, and the defendant refused to fulfil his bargain, the defence being that he thought he was buying old oats, whereas these oats were new. Sir James Hannen said: "In order to relieve the defendant from liability it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats." Applying that to the present case, the plaintiffs here believed the defendants to believe that they were buying an existing policy on a life then in being, and they further believed that the defendants believed the plaintiffs to be selling a policy on a life in being. To what date should that common mistake be referred? In my opinion, it ought to be referred to the date of the contract. From that date the policy belonged in equity to the purchasers, and I do not think that any information obtained by them after that date would, in the absence of special agreement, affect their conscience, or prevent them from accepting the policy moneys, if they were otherwise entitled thereto, and I proceed upon that footing. But on behalf of the defendants it is said that there is no case shewing that a contract of this kind can be set aside after completion. The two cases of *Colyer* v. *Clay* (2) and *Cochrane* v. *Willis* (3) scarcely go the length of saying that it is the practice of the Court to set aside a contract after completion on the ground of common mistake. But in *Colyer* v. *Clay* (2)

(1) L. R. 6 Q. B. 597, 611. (2) 7 Beav. 188, 193.
(3) L. R. 1 Ch. 58, 63.

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the Master of the Rolls said: "I am of opinion that it" (the contract) "cannot be enforced as it stands: to do so would be manifestly unjust, because both the parties entered into the arrangement under a common mistake." That, however, was a suit for specific performance of a contract, not to set it aside. In *Cochrane* v. *Willis* (1), where an agreement was entered into by a tenant in tail on the assumption that the tenant for life was alive, when in fact he was dead, Knight Bruce L.J. went a little further, and said: "It would be contrary to all the rules of equity and common law to give effect to such an agreement, or to hold that a person ought to be bound by it." I do not think that the Lord Justice would have used that language if he had thought that the contract could not be set aside. I think that this contract was avoidable by either party on the ground of common mistake, and that the plaintiffs are entitled to the relief which they ask; and, having regard to my findings of fact, I have no hesitation in ordering the defendants to pay the costs of the action.

Solicitors: *Walker, Son & Field, for A. A. Walker, Cambridge; Dubois & Williams, for R. C. & S. Burrows, Cambridge.*

(1) L. R. 1 Ch. 58, 63.

C. C. M. D.

In re TOLLEMACHE.

KEKEWICH J.

1903

Jan. 13, 24.

[1902 T. 992.]

Trust—Administration—Unauthorized Change of Investment—Sanction of Court—Jurisdiction.

In cases of emergency the Court has an extraordinary jurisdiction founded on necessity to go beyond the mere administration of a trust according to the terms of the instrument creating it; but the Court will not sanction a change of investment not authorized by the instrument of trust on the ground that it will be to the advantage of the beneficiaries. The circumstances which will induce the Court to exercise this extraordinary jurisdiction illustrated.

In re Morrison, [1901] 1 Ch. 701, and *In re New*, [1901] 2 Ch. 534, discussed.

THE following statement is taken from the judgment of the Court:—

The applicant was tenant for life under certain wills of a large amount of personal estate. Subject to that life interest, the property went to the applicant's children other than her eldest son, she having a power of appointment in the usual form. That power had been extensively exercised, and the appointees had settled their shares so that their children born or unborn had become interested. In order to raise money for purposes not necessary to be specified, the applicant had insured her life for large amounts in first-class offices, and had mortgaged her life estate to secure interest and premiums. It was proposed that the trustees of the wills should take over this security. Accordingly, an originating summons was taken out by the applicant asking the sanction of the Court to this proposal. The policies afforded an ample margin as regards capital, and the income of the trust estate was largely in excess of the interest and premiums, so that the transaction was perfectly safe. The advantage consisted in this. In order to take over the security it would be necessary for the trustees to realize trust investments yielding 3 per cent. per annum, whereas the mortgage interest was calculated on a rate of 3½ per cent. per annum, and the amount of the mortgage debt was such that

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the difference of ½ per cent. would make a large addition to the applicant's income. The application, however, was in nowise based on her personal benefit. She had been in the habit of making an allowance to her husband, who was without means, and also to the eldest son, who, as already mentioned, was not interested in the trust estate. She wished to make some provision for him, because unfortunately the reason for his exclusion from interest in the trust estate had ceased, and he also was without means. The wish to make such provision was not the only motive for the application, but it was one of considerable weight. The other reasons may be thus summarized. All the children (excluding as henceforward is done the eldest son), or all except one daughter, were more or less dependent on the mother, and that one daughter received an annuity from her mother under a covenant contained in her marriage settlement. The applicant had by settlements made on the marriages of the children covenanted to make annual payments to them, and she had been in the habit of making voluntary allowances to those entitled under the covenants and the other children. These covenanted payments and voluntary allowances were generous and perhaps in excess of prudence, having regard to the interest on the mortgage debt and the premiums, which together formed a large deduction from the applicant's income, but they were not out of proportion to the ultimate beneficial interests of the children in the settled property. She found it difficult to maintain these payments and allowances and also to keep up the house in which she resided, and which she naturally wished to keep up as a family home. She foresaw increasing demands on her purse, and she was at a loss to know how to meet them without an increase of income. The proposed transaction would give that increase to so substantial an extent as to enable her to do what she desired, and it was not open to doubt that this would be for the benefit of the children. It could not be said to be for the benefit of the actual or possible grandchildren except so far as they were advantaged by the welfare of their parents.

The application was heard in chambers, but the judgment was delivered in open Court.

Warrington, K.C., and *G. R. Northcote*, for the applicant submitted that the proposal would be for the advantage of the beneficiaries, and that in the special circumstances of the case the Court had jurisdiction to sanction it: *In re New*. (1) They also referred to the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3.

Hornell, for the children.

Brabant, for the trustees.

Cur. adv. vult.

Jan. 24. KEKEWICH J. (after stating the facts as above set out). It being impossible to suggest that the proposed investment is authorized by the instruments of trust, the question is whether, assuming it to be safe and beneficial, the Court can or ought to sanction it. Generally speaking, the function and duty of the Court is to administer the trusts which are placed under its control, and not to exceed the limits of investment or application fixed on their true construction by the instruments creating the trusts. There is authority, to be presently mentioned, for saying that there are exceptions to this general rule, but it will be convenient first to state what according to my experience has been the practice of the Court. The statement must necessarily be according to my experience, because applications of this character are almost universally—and, let me add, in my opinion best—disposed of in chambers; and although there is of course an interchange of opinion between the judges on such subjects, the detailed facts and circumstances of each particular case can be thoroughly known only to the judge to whom the application is made, and he alone is responsible for the ultimate order. It may be assumed that judges have differed in their views of their powers and duties and in the exercise of them, but I do not believe that there has been any substantial variation from the practice which has prevailed in my own chambers.

The most common application going beyond the administration of a trust according to the instrument creating it is one for advances for the benefit of an infant out of capital not

(1) [1901] 2 Ch. 534.

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sanctioned by the instrument creating the trust. I have never hesitated to do this where satisfied that the advancement is certainly beneficial, and where the infant is contingently interested, as, for instance, entitled only on attaining majority, I have included in the advance the sum necessary to effect a policy of insurance to cover the contingency. This is an illustration of the maxim that necessity has no law.

Another frequent application has been of this character. A testator engaged in some business has failed to make provision for its continuance, and perhaps has even directed it to be realized; but realization except at break-up prices is impossible, whereas the business yields an income for the maintenance of the family, which would otherwise be left without adequate support. It is proposed to carry on the business, and perhaps even to apply some part of the estate in purchase of stock-in-trade. Applications to this end require exceeding care, which must not cease with the first order; but the exercise of such extraordinary jurisdiction has the sanction of established practice, and is generally justified by beneficial results.

Almost equally frequent of late years have been applications for the sale to a joint stock company of the business owned by a testator, or in which he had a share, where no power for that purpose can be found in the will. The inherent difficulty here lies in the circumstance that a newly formed company cannot pay more than a small proportion of the purchase-money in cash, but can only offer shares or debentures, in which the trustees of the will are seldom authorized to invest. Here, again, it behoves the judge to be cautious down to the most minute details; but if he is satisfied that for want of working capital or other reason the business cannot be carried on as perhaps the testator intended it should be, and that no sale for cash is possible, so that the proposed scheme affords the only practicable means of extricating the family from their embarrassments, there is no sufficient objection to its sanction by the Court. But I have uniformly declined to allow the trustees to hold the shares and debentures as proper investments of the trust estate. Immediate realization is generally impossible, and sales can probably be effected to reasonable

advantage only in small parcels judiciously put on the market. Thus far I have authorized retention sometimes extended by successive orders, and as regards some of the shares and debentures over a considerable period, which has occasionally been fixed with reference to the majority of a son engaged in the business likely to accept them in satisfaction of his portion, but realization as the ultimate object to be distinctly kept in view has always been insisted on.

Analogous to this class of cases is that where what is called reconstruction of a company is contemplated. This seldom occurs unless the original company has proved a failure in some way or to some extent, and the object is by the introduction of new capital or otherwise to place the concern on a sound and profitable footing. This may be, and often is, a matter of exceeding urgency. In granting applications for leave to concur in the reconstruction, and to accept shares or debentures in the new company, the question of retaining them has always been dealt with on the same lines, and realization at the first convenient opportunity has ever been directed and enforced.

One other illustration may perhaps be usefully mentioned. A testator possessed of a mortgage of freehold estate settles the mortgage debt with, it may be, other property. Possibly he contemplates that the mortgage may be paid off, and provides for the investment of the money received together with his other property in different modes, not including the purchase of real estate. Circumstances arise which render it necessary for the trustees of the will to enforce their security, and, the mortgage debt not being forthcoming, and a sale being practically impossible, they apply to the Court for leave to commence an action of foreclosure. The Court sanctions this if satisfied that this is the best thing to do, but, an order of foreclosure absolute having been obtained, the Court does not sanction the trustees holding the freehold estate now vested in them as part of the property settled by the testator's will. The Court insists on sale, not perhaps immediately or at enormous sacrifice, but as soon as possible, because to do otherwise would be (using the language of Buckley J. in a case to

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be presently mentioned) to authorize trustees to take on the ground that it is beneficial an investment which the testator has not authorized.

The above are illustrations of the exercise by the Court, justified by the practical necessity of the case, of jurisdiction going beyond the mere administration of trusts according to the terms of the instruments creating them. Others might be given, the applications or rather the circumstances inducing them exhibiting large varieties, but those mentioned suffice to explain the scope of the practice of the Court.

There might be added illustrations of the refusal of the Court to exercise this extraordinary jurisdiction, but there is no occasion. All the cases of refusal may be grouped under one of two classes. Either, notwithstanding the advantage actual and prospective of what is proposed to be done, there is no urgency for it, and the existing state of things may without great mischief be allowed to remain, or the terms on which the advantage can be gained are such that the Court would by accepting them create a new trust in lieu of that which it is administering.

Turn now to the authorities. About *West of England and South Wales District Bank* v. *Murch* (1), decided by Fry J., little need be said. The judgment of the learned judge, so far as it concerns us, is entirely based on an executor's power to compromise, which is not here in question. *In re Crawshay* (2), decided by North J. and reported sufficiently in the *Weekly Notes* and more fully in the *Law Times*, may also be treated briefly. That was a proposed sale of the business of a testator to a joint stock company, one of the terms being the allocation of shares and debentures of that company among the persons interested under the will in the properties proposed to be sold. This scheme is obviously and entirely different from one for the sale of a business in consideration of shares and debentures to be issued to the trustees for retention for a limited time and ultimate realization, and it was in fact an application to the Court to sanction a compulsory taking by beneficiaries of shares and debentures in lieu of their proper proportions of the estate.

(1) (1883) 23 Ch. D. 138. (2) W N. (1888) 246; 60 L. T. 357, 359.

It was a monstrous proposition, and would not, I believe, have received the shadow of sanction from any judge. North J. refused it without hesitation. This is his language: "I should not be administering the trusts created by the testator if I consented to this scheme. I should be altering his trusts and substituting something quite outside the will." *In re Morrison* (1) was a case of different character. There it was proposed to sell the business of a testator to a joint stock company in consideration of shares and debenture stock, which it was intended the trustees should hold as long as they should think fit, as if the same had formed part of the estate of the testator. Buckley J. refused the application, saying (2) that in his opinion there does not reside in this Court any power to authorize trustees to take, on the ground that it is beneficial, an investment which the testator has not authorized. I entirely agree with him; but note that the gist of decision lies in the words "on the ground that it is beneficial," and to omit to give due weight to this is to misinterpret it. The alternative of holding the shares and debenture stock for a limited period with a view to realization was not suggested to or by the Court, and it may be that any such alternative would have been unacceptable to the parties concerned, or practically impossible. The case is no authority for saying that the alternative order could not have been properly made. It is not for me to say that in the subsequent case, and the only other to be noticed, Cozens-Hardy J. ought to have made an order in the alternative form; but at any rate, if I may venture to say so, he took a prudent course in leaving the matter to be dealt with by the Court of Appeal. The case now under consideration is known as *In re New* (3), but really there were applications in no less than three estates. The trustees of each estate held shares in the Wollaton Colliery Company, Limited, the reconstruction of which for urgent and good reasons was proposed. One set of trustees had power to invest in shares and debentures, but the other two had not. The Court of Appeal held that the trustees of all three might have liberty to concur in the reconstruction, but that those trustees who had no power to invest

(1) [1901] 1 Ch. 701. (2) [1901] 1 Ch. 707.
(3) [1901] 2 Ch. 534.

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in shares or debentures of such a company as was intended to be formed must undertake to apply to the Court for leave to further retain the shares and debentures received under the scheme of reconstruction, if they desired to retain them beyond one year from the time when the reconstruction was carried out. The judgment of the Court of Appeal was delivered by Romer L.J. He required that the then existing evidence should be supplemented so as to make clear the points urged in the course of argument as to the importance of further capital being provided by the proposed reconstruction of the company, the issue of debentures by the new company, and the difficulties which would arise if the trustees were obliged to stand aloof and take no part in any reconstruction. This no doubt was done, and such evidence must be taken to be essential to the decision. So far as the last point to which evidence was to be directed is concerned, there is no occasion to dwell on it, because it points directly and solely to the power of compromise which is recognised in the judgment, and, as already stated, there is nothing of this kind here. The foundation of the exercise of jurisdiction by the Court is to be found in an interlocutory observation by Romer L.J., speaking no doubt on behalf of the other Lords Justices as well as himself. He says (1): "The principle seems to be this—that the Court may, on an emergency, do something not authorized by the trust. It has no general power to interfere with or disregard the trust; but there are cases where the Court has gone beyond the express provisions of the trust instrument—cases of emergency, cases not foreseen or provided for by the author of the trust, where the circumstances require that something should be done." There is a passage in the considered judgment (2) which substantially expresses the same view in different language, and both passages must be taken to be controlled by the caution (2) given in a later passage of the judgment respecting the exercise by the Court of extraordinary jurisdiction. Observe that the Lord Justice adds: "It need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate."

(1) [1901] 2 Ch. 543. (2) [1901] 2 Ch. 545.

But the really important observation with reference to the case in hand is that the Court of Appeal, while sanctioning the concurrence of the trustees in the scheme of reconstruction, did not sanction the retention of shares or debentures by the trustees, who had no power of making an investment of that character. They made the very order which, as already explained, it has been the practice of the Court to make, at least in my chambers, in cases of this character. It was argued before me that the decision in *In re New* (1) introduced a novel principle or rule, and that in many cases, where the Court has refused to sanction proposals going outside the administration of the trusts according to the terms of the instrument creating them, the result would have been different if the judge had had the decision in *In re New* (1) before him. From that I wholly dissent. The decision is valuable and useful as giving the authority of the Court of Appeal to what otherwise depended on the practice of the Court, and to some extent the views of particular judges, but it does not purport to enlarge the jurisdiction of the Court, or justify the Court in sanctioning any scheme which might not have been sanctioned without it.

In this particular case I have nothing more than a proposal to sanction a change of investment not authorized by the instrument of trust, on the ground that it will be to the advantage of the beneficiaries. From what I have mentioned at the outset of this judgment, it might be urged that this ground is somewhat too broadly stated; but, even assuming that such advantage is proved, I have just that application which Buckley J. in *In re Morrison* (2) distinctly said could not be granted. Does the judgment of the Court of Appeal afford any reason for departing from what was said by that learned judge? I can find none.

There was a new point made before me. It has been mooted before, but I am not aware of any judicial dictum on it, and it is not noticed in the arguments or in the judgments in any of the cases cited. The point is that the jurisdiction of the Court has by implication been enlarged by the 3rd section of the Judicial Trustees Act, 1896. This enactment enables the

(1) [1901] 2 Ch. 534. (2) [1901] 1 Ch. 707.

KEKEWICH J. 1903 TOLLEMACHE, *In re.*

Court to relieve a trustee either wholly or partially from liability for a breach of trust. This can only be done where the Court is convinced that the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the Court in the matter in which he committed such breach. This last provision postulates a duty in the trustee to obtain the direction of the Court, and negligence in the omission to do it, which negligence may nevertheless be excused. It is difficult to see how a trustee could be excused for such negligence, if the Court when in possession of all the facts were convinced that he could not have been with any propriety or on any terms directed to commit the breach of trust which he in fact committed. That, however, need not be further discussed. The point made is that, inasmuch as the Court has authority to excuse a trustee from liability for a breach of trust committed, or, in other words, to bind the beneficiaries to accept what was done as if it were no breach of trust at all, therefore the Court must have power to exercise that authority by anticipation, and to excuse a trustee from liability for a breach of trust contemplated. I am not convinced. The statutory provision, though, if I may venture to say so, not a good example of clear and careful legislation, has undoubtedly proved useful; but to extend it as proposed by implication, and to say that the Court can sanction any dealing with trust property, however discordant from the trusts declared, provided only it be honest—whatever that may mean—and reasonable, would be a subversion of principle. If the Legislature intends to confer that power on the Court, it must do so in express and unambiguous terms.

There will be no order on the summons. I doubt whether the action is so constituted as to justify my giving any direction respecting the payment of costs out of the estate. The trustees are, of course, entitled to take theirs as costs, charges, and expenses properly incurred; but, even as regards them, I do not see my way to giving any directions.

Solicitor: *J. Bertram.*

H. B. H.

In re RYLAND.
ROPER *v.* RYLAND.

[1902 R. 794.]

BYRNE J.

1902

Nov. 6, 12, 13, 26.

1903.

Jan. 26.

Charity—Gift to—Devise of Real Estate in Trust for Sale—Share of Rents until Sale—Consent of Tenant for Life—"Land"—Vesting in Official Trustee—Mortmain and Charitable Uses Act, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5, 6.

A testator, who died in 1900, gave all his real and personal estate to trustees upon trust for conversion, but directed that no part of his freeholds and leaseholds should be sold during the lifetime of his wife without her consent in writing. The income arising from this estate, and the rents of the unsold portion thereof, were distributable during the life of the widow—one-fourth to her, and the remaining three-fourths between four named charities, to which, after the death of the widow, the whole of the residuary estate was eventually given. On an application by the trustees for the opinion of the Court whether the directions for sale and vesting contained in ss. 5 and 6 of the Mortmain and Charitable Uses Act, 1891, applied to this gift:—

Held, that there were two interests given to the charities, the one a reversionary interest which was not "land" within the meaning of the Act, and the other an immediate terminable interest in the income of land which the trustees were expressly forbidden to sell during the lifetime of the widow without her consent; no consent having been given, and the land from which the income arose being still unconverted at the expiration of a year from the testator's death, the interest in this income was "land" within the meaning of the Act, and that it was now vested by force of s. 6 in the Official Trustee of Charity Lands.

ADJOURNED SUMMONS.

This was an application by one of the trustees and executors of the will and codicil of the late William Ryland for the advice of the Court upon several matters arising out of the various charitable dispositions of his property made by the testator, one of which raised a question, under the Mortmain and Charitable Uses Act, 1891, whether a share and interest in the rents and profits of real and leasehold properties as given, pending conversion, among certain charities, was "land" within the meaning of s. 3 of the Act, and, if so, whether it had vested in the Official Trustee of Charity Lands in consequence of its not having been sold within one year from the testator's

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death in accordance with the provisions of s. 5. The will, so far as material for the purposes of this report, was as follows :—

By his will of July, 1900, the testator gave and devised all his real and personal estate to his trustees, of whom the plaintiff and the defendant Clara Ryland, the wife, were two, their heirs, executors, administrators, and assigns, upon trust to carry out the directions which followed ; and after giving several legacies and annuities, including one of 1200*l.* per annum to his said wife during her widowhood, and subject to a particular disposition of certain drawings, the testator directed all his pictures to be within twelve calendar months from the time of his decease offered for sale by public auction in a particular manner, and he specifically disposed of those not sold, and he directed that his trustees should invest the net moneys realized from the sale of his pictures in any securities authorized by law for the investment of trust funds, or in the purchase of freehold ground-rents in England or in the other securities therein specified, with power to vary, the income to be applied during the lifetime of his wife, the defendant, Clara Rylands, as follows (after satisfying the annuities) : One-fourth to his said wife during her life, and the remainder equally between and amongst the National Life Boat Institution, the Port of Hull Society and Sailors' Orphan Home (orphanage branch), the Royal Masonic Institution for Boys, and Royal Masonic Institution for Girls ; and after the death of his wife the said purchase-money should sink into and form part of his residuary estate. The testator then directed his trustees to convert into money the residue of his estate at their discretion, and further directed that his trustees should sell no part of his freeholds or leaseholds during the lifetime of his said wife without her consent in writing, and his executors and trustees were authorized to retain any of his investments in their then present form without incurring any responsibility for any loss to be occasioned by such retention. He then directed that the residue of his estate should be divided as follows : Two-fifths to the National Life Boat Institution, two-fifths to the Port of Hull Society and Sailors' Orphan

Home, to be applied towards the purposes of the orphanage branch of that institution, one-tenth to the Royal Masonic Institution for Boys, and one-tenth to the Royal Masonic Institution for Girls. By a codicil to his will dated October 4, 1900, the testator declared that it was his will and intention—(1.) that the annuities by his will bequeathed should be payable out of his general estate, and not exclusively out of the moneys realized from the sale of his pictures; (2.) that the directions as to the mode of investment of the moneys realized from the sale of his pictures should apply also to his general estate as and when the same should be realized; and (3.) that the income of his general estate, after satisfying the annuities for the time being payable, should be applied in the manner by his will directed with reference to the income arising from the moneys realized from the sale of his pictures. The testator died on October 11, 1900, and his will and codicil were duly proved by two out of the three executors named on December 28, 1900. There were certain freeholds and leaseholds forming part of the testator's residuary estate which still remained unsold.

The Court having decided, on an earlier question raised by the summons, that according to the true construction of the said will and codicil the actual income from such part of the testator's residuary estate as remained unsold, and from the proceeds of any sale thereof, was thereby made divisible during the lifetime of the widow—one-fourth to her, and the remaining three-fourths among the four charitable institutions named in the will—the further question dealt with in this report, as to the effect of the Mortmain and Charitable Uses Act, 1891, now came on for argument.

George Cave, for the trustees. The question now arises whether the Mortmain and Charitable Uses Act, 1891, applies to the gift of income to charities with the result that either the land ought to be sold forthwith, or this case is covered by the decisions in *In re Wilkinson* (1) and *In re Sidebottom.* (2)

Vaughan Hawkins, for the Official Trustee of Charity Lands.

1) [1902] 1 Ch. 841. (2) [1902] 2 Ch. 389.

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It is more than a year since the death of the testator, and the land has not been sold; it has therefore, under s. 6 of the Act of 1891, already vested in the Official Trustee of Charity Lands, and he wishes to sell it at once. This land has not been converted into "personal estate arising from land" under s. 3, and it is still bound by the Act. The decision in *In re Sidebottom* (1) was limited to a case where there was an out and out trust for conversion. Here there is a prohibition on sale during the lifetime of the widow except with her consent, and *In re Sidebottom* (1) does not apply. Negative words suspend conversion, and till the time limited has elapsed there is no conversion. The rule laid down in *Fletcher* v. *Ashburner* (2), that where real estate is ordered to be sold it at once becomes personalty, implies that there is a direction for sale; and in such case the fact that the sale is to be made with the consent or at the request or by the direction of some person, or with power to postpone, is immaterial: *Lechmere* v. *Earl of Carlisle* (3), *Thornton* v. *Hawley* (4), and *Davies* v. *Goodhew*. (5) The direction to convert must be absolute and imperative: Lewin on Trusts, 10th ed. p. 1159; whereas in this case the trustees are not to sell without request. Therefore the property is not yet converted, and the share of rents given to the charities and the land itself have vested in the official trustee, who can sell the whole property at once. If it is lawful to create a trust for sale which operates as a conversion and (under *In re Sidebottom* (1)) makes the Act of 1891 inapplicable, and then to add a direction that the land shall not be sold for a fixed period, it will be possible to evade the Act altogether.

[BYRNE J. The gift of proceeds of sale and the gift of rents are different gifts; they are given in different proportions.]

The whole interest of the charities is vested in the official trustee; and the land cannot be divided into pieces of which one shall be treated as land and the other not. *In re Sidebottom* (1) only applies where the charity can take nothing

(1) [1902] 2 Ch. 389.
(2) (1779) 1 Bro. C. C. 497; 1 W. & T. 7th ed. p. 327.
(3) (1733) 3 P. Wms. 211, 219.
(4) (1804) 10 Ves. 129; 7 R. R. 359.
(5) (1834) 6 Sim. 585; 38 R. R. 183.

as land. If a distinction is drawn between these gifts, it is nevertheless clear that the rents have vested in the official trustee.

Levett, K.C., and *Nicolas*, for the widow. The official trustee has no interest in the rents or in the proceeds of sale. Conversion takes place at once under such a clause as this. Where under a deed there must sooner or later be a conversion, it has been held that that conversion takes place at the date of the deed, not at the date when the request is made: *Attorney-General* v. *Dodd.* (1) In that case the trustees could not sell without the request of the husband and wife, so it is exactly in point. [*Edwards* v. *Countess of Warwick* (2) and *Doughty* v. *Bull* (3) were also cited.] There is no authority for the proposition that there is a difference between a trust for sale with consent and a trust for sale not to be carried out before a certain time without request. Here the trust for sale is imperative, and might take place at once. The charities can take nothing under the will in the shape of land, and the case is covered by *In re Sidebottom.* (4) Delay in selling and the presence of a fetter on the sale do not affect the rule; and there is nothing to the contrary in the cases which have been cited. Where there must be ultimate conversion, the Court holds that there is immediate conversion: *Wrightson* v. *Macaulay.* (5) In *In re Sidebottom* (4) the rule is said to depend upon the question whether the trust is effective or not.

It is usual in settlements of moneys to be produced by sale of real estate at the request of the settlor to declare the trusts as if the property had been actually sold: Davidson's Precedents, 3rd ed. vol. iii. pt. 2, pp. 857, 870. Similarly in this case the rents are personalty arising from or connected with land.

The result will not be to enable charities to hold land for long periods, for that is expressly provided against in *In re Sidebottom.* (4) The charities have no power to force a sale; they cannot revoke the trusts or prejudice the widow's right to withhold consent.

(1) [1894] 2 Q. B. 150.
(2) (1723) 2 P. Wms. 171.
(3) (1725) 2 P. Wms. 320.
(4) [1902] 2 Ch. 389.
(5) (1845) 4 Hare, 487, 497.

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W. M. Cann, for the Royal Masonic Institution for Boys, adopted this argument, and, on the question of the jurisdiction of the Court to extend the time for vesting, referred to *Banner* v. *Johnston*. (1)

M. Romer, for the Royal Masonic Institution for Girls,

Peterson, for the National Lifeboat Institution, and

O. L. Clare, for the Port of Hull Society, took no part in this argument.

Vaughan Hawkins, in reply.

[BYRNE J. If the Court has power after the lands have vested in the official trustee to postpone or extend the time for sale, it would, I think, be proper and convenient in the present case to extend the time.]

Possibly; but the question is, Can land now be held under the Act of 1891 upon a continuing trust to pay a share of rents and profits to charity when it is expressly provided by s. 5 that land shall be sold within a limited time? The general effect of the Act was discussed in *In re Hume*. (2) That which has to be sold is the estate in land which is given to the charity, and which the charity now has; a life estate is a perfectly good estate in land, and an equitable estate for life, as this is, is on the same footing as a legal estate for life. The interest which these charities take during the life of the widow in the rents and profits of the unsold portion of this residuary estate is "land" within the meaning of the Act, and has vested in the official trustee.

Cur. adv. vult.

Jan. 26. BYRNE J., after stating the will and codicil as above, continued:—The first question is whether or not, a year having elapsed since the death of the testator and the time for sale not having been extended under s. 5 of the Mortmain and Charitable Uses Act, 1891, the interests in the freeholds and leaseholds given by the will to charities have vested in the Official Trustee of Charity Lands under s. 6 of the same Act. It will be observed that, reading the codicil with the will, there is a trust for sale, applicable to the whole of the land, which

(1) (1871) L. R. 5 H. L. 157. (2) [1895] 1 Ch. 422.

must be exercised upon the death of the widow, but the exercise of which during her lifetime without her consent in writing is expressly negatived. It is settled by the decision of the Court of Appeal in the case of *In re Sidebottom* (1) that proceeds of sale of land subject to an immediate trust for sale are not "land" within the meaning of the Act of 1891, and that the provisions of ss. 5 and 6 have consequently no application. In such a case the charity takes the interest in the proceeds given to it without any obligation to apply for an extension of time should the trustees neglect or be unable to sell within a year from the death of the testator, although this does not justify the trustees in indefinitely postponing the sale. Where the interest given is reversionary, if it is only an interest in proceeds of sale of land subject to a trust for sale to take effect immediately upon the determination of prior life or other estates in the land itself, I think that such an interest is also not "land" within the meaning of the Act of 1891, and that the provisions of ss. 5 and 6 do not apply. It appears to me that upon the true construction of the will and codicil in the present case there are, in fact, two interests given to the charities, the one a reversionary interest, which is not "land" within the meaning of the Act, and as to which there is no necessity under the Act for an extension of time and no question of vesting in the Official Trustee of Charity Lands, and the other an immediate terminable interest in the income of land which the trustees are expressly forbidden to sell during the lifetime of the widow without her consent in writing. No such consent has been given, and at the expiration of a year from the testator's death the land from which the income arises remained, and it still remains, unconverted. I consider that the interest in the income given to the charities is "land" within the meaning of the Act, and that consequently, such interest not having been sold within the year, and no application under the Act for an extension of time having been made within that period, it has by force of the Act vested in the Official Trustee of Charity Lands. It appears to me that the words of s. 6 are clear and precise, and that there can be no

(1) [1902] 2 Ch. 389.

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reasonable ground for saying that the Court can avoid the vesting by an order extending the time on a subsequent application.

There is a class of cases to which I was referred in the course of the argument shewing that, where there is a trust for conversion with the consent of a certain person, the introduction of the words "with consent" is not sufficient to prevent its being an absolute trust for conversion; but it appears to me that those cases do not apply here, as in the will before me there is an express negation of the power to sell except with the consent in writing of the widow.

Then there is one other point which I may mention, although it is not now before me for decision. I am not prepared to say that when the property is in the hands of the Official Trustee of Charity Lands there is not power, either in the Charity Commissioners or in the Court, as the case may be, to enlarge the time for sale of the land, notwithstanding the fact that the year has elapsed and the land has vested. I do not, however, decide that point, as it is not before me.

[The Court eventually made a declaration that the life interest in three-fourths of the land in which the charities were interested had vested in the Official Trustee of Charity Lands.]

Solicitors: *Johnson, Weatherall & Sturt, for Broomhead, Wightman & Moore, Sheffield; Solicitor for the Treasury; S. J. Attenborough; F. Richardson & Sadler; Clayton, Sons & Fargus; Williamson, Hill & Co.*

W. C. D.

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Jan. 15.

[1900 L. 566.]

Patent Action—Taxation—Costs of Appeal—Counsel's View after Trial for Purposes of Appeal—Further Evidence on Appeal—Costs of Witness attending but not called—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 4; *Order* LXV., *r.* 27, *sub-r.* 29.

There is no difference in principle between the costs of counsel's view before trial and the costs of counsel's view after trial for the purposes of an appeal; and although such costs will not as a general rule be allowed in party and party taxation, yet the Court will not interfere with the decision of the taxing master where, in the exercise of his discretion, he has allowed them.

An appellant gave notice of motion to adduce further evidence on the appeal on two points. At the hearing of the appeal he obtained leave and gave further evidence on the first point, and his witness was not cross-examined. Thereupon it became unnecessary to give further evidence on the second point, and he made no application in respect thereof. The appeal was allowed with costs:—

Held, that the taxing master had no jurisdiction to allow the appellant the costs of a witness who had attended the Court of Appeal to give evidence on the second point, if called.

Quære, whether, if leave to adduce evidence on the second point had been obtained, the costs of a witness attending for that purpose, but not called, could be allowed.

SUMMONS to review taxation.

In this action the plaintiffs claimed an injunction and damages for the alleged infringement of their patent flues, and at the trial before Cozens-Hardy J. judgment was given for the plaintiffs with costs. The defendants appealed, and gave notice of their intention to apply to the Court of Appeal for leave to adduce evidence of furnace flues made (1.) by John Brown & Co., Limited; (2.) by C. D. Holmes & Co., of Hull. On the hearing of the appeal the defendants obtained leave to adduce evidence of flues made by John Brown & Co., Limited, and their witness on this point was not cross-examined. Thereupon they did not ask for leave to give evidence on flues made by C. D. Holmes & Co., although they had an expert witness in attendance for that purpose.

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The appeal was allowed with costs of the appeal and of the Court below, and in taxing the defendants' costs of the action the master allowed (1.) fees of fifty guineas to leading counsel and thirty guineas to junior counsel for a view of the defendants' works after judgment in the Court below; (2.) 24*l.* 2*s.* for the witness Catton, who attended the Court of Appeal to give evidence on the flues made by C. D. Holmes & Co. The plaintiffs objected to both these allowances, and, on the master overruling their objections, took out a summons to review, which was adjourned into Court.

The master's answers to the plaintiffs' objections were as follows:—

"Objection I.

"In this action the plaintiffs claimed damages for an infringement of their Devis patent.

"The learned judge held that the defendants' process and manufacture copied the plaintiffs' process under the above patent, and gave judgment in their favour.

"In the Court of Appeal it was of the highest importance to the defendants to shew that their flues were not made in accordance with the Devis patent; and that Court held that neither the plaintiffs' nor the defendants' flues were in accord therewith, and reversed the judgment of the Court below.

"I think it is a fair deduction to make that the defendants' counsel were better versed in the technicalities of their clients' case consequent on their view, and that thereby they were able to persuade the Court of appeal that after all the defendants had right on their side and were entitled to the judgment of that Court, and, applying the amended sub-rule 29 of rule 27, Order LXV., that the expense of the view was properly incurred for the defence of the defendants' rights, I have allowed the items objected to.

"Objection II.

"I have carefully considered the allowance for the witness Catton; and that being so I submit, on the authority of *Oliver* v. *Robins* (1), that the Court will not interfere. But I will

(1) (1894) 43 W. R. 137.

add my reasons. Catton was the chief draftsman of C. D. Holmes & Co., and the defendants' counsel advised that he should attend to give evidence. A witness, Gill, was examined on the flues made by John Brown & Co., Limited, and his cross-examination was reserved until the following day, when the plaintiffs' counsel declined to cross-examine him. In the opinion of the defendants' counsel it then became unnecessary to call Catton. This witness's allowance was reasonable and proper and should be allowed."

A. J. Walter, for the summons. As to counsel's view. The only question in issue in the action was whether the flues made by the defendants were an infringement of the plaintiffs' flues, and models of the flues made by the plaintiffs and defendants were put in evidence at the trial before Cozens-Hardy J. The evidence on this issue having been given in the Court below, it was unnecessary for the defendants' counsel to have a view of the defendants' works for the purpose of the appeal. The further evidence given in the Court of Appeal was not in respect of flues made by the defendants, but of flues made by another firm. In the practice note of the taxing masters of Hilary Sittings, 1902, it is laid down that the costs of a "view by counsel as a general rule will be disallowed."

[FARWELL J. Is not this within the discretion of the taxing master?]

I admit it is, and, if the view had been taken for the purposes of the trial, probably no objection would have been raised, although the allowance is unusual. But he has proceeded on a wrong principle. Costs of counsel's view after trial for an appeal have never been allowed before between party and party. They are costs incurred through "over-caution" within sub-rule 29 of rule 27 of Order LXV., and are a luxury and an unnecessary expense which the appellants must pay for themselves. As to the witness Catton, the costs of his attendance cannot be allowed, because leave was not applied for and no evidence was given on the flues made by Holmes & Co.: Order LVIII., r. 4.

T. Terrell, K.C., and *J. C. Graham*, for the defendants.

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[FARWELL J. I have never before heard of costs of counsel's view after judgment being allowed.]

We rely on the reasons given by the taxing master for overruling the plaintiffs' objections, and the Court will not lightly interfere with the exercise of his discretion. The view made all the difference, and enabled the appellants' counsel to place the case before the Court of Appeal in such a way that they succeeded in obtaining judgment. As to Catton, his attendance was necessary to give evidence, and it only became unnecessary to apply for leave to call him when the plaintiffs' counsel intimated that they should not cross-examine Gill. The costs of witnesses attending but not called are always allowed in the Court below.

A. J. Walter, in reply.

FARWELL J. This is a summons to review the taxing master's decision on two points. The first objection is that he has allowed the costs of a view by counsel after judgment for the purposes of the appeal. That is undoubtedly most unusual; but the conclusion I have come to is that it is a matter for the taxing master's discretion, and, therefore, as he has exercised his discretion, I cannot see my way to interfere with it. Mr. Walter has read to me from the practice notes used by the masters a note that as a rule a view by counsel will be disallowed—that is, in taxing as between party and party. He also fairly admitted that, if the taxing master had allowed this view for the purpose of the trial, the allowance could not have been objected to. I am unable to see any difference in principle between the discretion exercised and exercisable by the taxing master with regard to a view before trial and with regard to a view after trial for the purposes of an appeal. The taxing master has said: "I think that it is a fair deduction to make that the defendants' counsel were better versed in the technicalities of their clients' case consequent on their view, and that thereby they were able to persuade the Court of Appeal that after all the defendants had right on their side and were entitled to the judgment." That comes, as I understand it, to this: that the taxing master considered, in the exercise

of his discretion, that it was necessary and proper for the due protection of the defendants' right that counsel should have this view. That being so, I cannot interfere with his discretion.

The second objection raises a point of some difficulty, and, so far as I know, it is novel. The defendants gave a notice of motion for leave to adduce further evidence at the hearing of the appeal. That motion was never formally opened as a motion is opened in the Courts below, but came on with the appeal, and was mentioned by counsel for the appellants in the course of his opening of the case generally. In order to make it intelligible it is necessary to say that the object of the application was to adduce evidence with respect to certain sections of flues manufactured by Brown & Co., Limited, and by Holmes & Co. The witnesses to be called were a Mr. Gill in respect of Brown & Co., Limited, and a Mr. Catton in respect of Holmes & Co. Both these witnesses were in Court. Mr. Terrell only asked to give evidence as to Brown's section, and called Mr. Gill, who gave evidence on Brown's section. The cross-examination of this witness was postponed in order that Mr. Moulton might consider whether he thought it necessary to cross-examine or not; but he did not in fact cross-examine. Thereupon Mr. Terrell says it became unnecessary for him to ask for leave to call Mr. Catton, because he had got all he wanted from Mr. Gill. But this is not the case of a trial in the Court below, where the taxing master is allowed in his discretion to say: "You were justified in bringing witnesses to prove your case up to the hilt; and when once you had done it, and the other side had refrained from cross-examination, you saved the public time by not calling this other witness, who was unnecessary because of the evidence you had already given which was not cross-examined to, and I shall allow you the costs of his attendance." This is quite a different matter. Order LVIII., r. 4, provides that on appeals further evidence shall be admitted on special grounds only, and not without special leave of the Court. How can I say that the taxing master has a discretion to allow the costs of a witness as to whom notice of motion was given, but with regard to whom

FARWELL J. 1903 LEEDS FORGE COMPANY, LIMITED v. DEIGHTON'S PATENT FLUE AND TUBE COMPANY, LIMITED.

no application was made at all to the Court of Appeal? If Catton was going to be called with respect to Brown's section, it might have been different; but Catton was to be called in respect of a different section manufactured by a different firm named Holmes & Co. That being so, there was nothing before the taxing master on which he could proceed. This evidence was not admitted, and could not be admitted without special leave. That special leave was not given. In my judgment, there was nothing before the taxing master on which he had any ground for exercising his discretion with regard to evidence in respect of which no leave was asked for. The result is, I must allow this objection; and as each party succeeds on one objection and fails on the other, I shall make no order as to the costs of this application.

Solicitors for plaintiffs: *Vincent & Vincent, for Day & Yewdall, Leeds.*

Solicitors for defendants: *Harrison & Davies, for Carter, Ramsden & Carter, Leeds.*

H. L. F.

FARWELL J. 1903 *Feb.* 17.

In re SAUNDERTON GLEBE LANDS. *Ex parte* THE RECTOR OF SAUNDERTON.

[1903 S. 023.]

Railway Company—Land compulsorily taken—Limited Owner — Compensation for Personal Injury, Inconvenience, or Annoyance—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 73.

Part of the purchase-money of land taken by a railway company may be allotted to a limited owner as compensation for personal injury, inconvenience, or annoyance upon evidence that this compensation had been allowed for in fixing the price, though no particular sum had been apportioned for that purpose when the price was fixed.

IN 1902 the joint committee of the Great Western and Central Railway Companies, acting under the powers of their joint Act of 1899 and the Great Western Railway Act of 1901, which incorporated the Lands Clauses Consolidation Act, 1845, agreed with the rector of Saunderton for the purchase of a

portion of his glebe at the price of 1600*l.* This price had been determined by two surveyors under s. 9 of the Lands Clauses Consolidation Act, and had been paid into court. The rector presented this petition, asking that 100*l.* might be paid to him out of the purchase-money as compensation for personal inconvenience and annoyance under s. 73 of the said Act. (1)

The evidence shewed that the companies were constructing a new line within fifty yards of the rectory on the east side, in a cutting varying in depth from seventeen to sixty feet, leading to the mouth of a tunnel about 110 yards from the house; and were also widening an existing line on the west side of the house within 130 yards. For these purposes they had constructed two temporary railways, crossing the only two roads by which the rectory could be approached, at points very near the house. These lines were constantly traversed by working trains, and caused delay and possible danger to persons going to or from the rectory. The main road had also been stopped altogether for a time until a bridge was made over the cutting. The companies were working a large steam navvy within sixty yards of the house, and using frequent explosions of gunpowder to loosen a large bank of earth, close to the house, which they were removing. The rector complained of nuisance and annoyance from these causes, and from the constant whistling of working trains entering the tunnel. No pecuniary damage was shewn.

The two surveyors who had fixed the price both filed affidavits that the question of personal compensation to the rector for injury, inconvenience, and annoyance had been considered in fixing the price, and, though they had not separately apportioned that compensation, the price of 1600*l.* would

(1) Sect. 73, after directing payment into court of the purchase-money of lands taken from limited owners, contains the following proviso: "Provided always, that it shall be in the discretion of the Court . . . . to allot to any tenant for life, or for any other partial or qualified estate, for his own use, a portion of the sum so paid into the bank . . . . as aforesaid, as compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the lands to be taken, and of the damage occasioned to the lands held therewith, by reason of the taking of such lands and the making of the works."

FARWELL J. 1903 SAUNDERTON GLEBE LANDS, *In re.* SAUNDERTON (RECTOR), *Ex parte.*

have been decreased by 100*l.* at the least if it had not been included.

C. E. Bovill, for the petitioner. The words of s. 73 clearly cover the order I ask for. A similar order was made in *In re Collis's Estate*. (1) There the compensation was apportioned by the surveyors in fixing the price. In this case they had not apportioned it, but have in fact done so by their affidavits.

Borthwick, for the President and Scholars of Magdalen College, Oxford (the patrons of the living), left the matter in the hands of the Court.

Medd, for the railway companies, did not oppose.

FARWELL J. As far as my recollection goes, the order asked is an unusual one; but it is within the words of s. 73, and a similar order appears to have been made in *Ex parte Rector of Little Steeping*. (2) I will make the order as prayed. Costs according to the Act.

Solicitors for petitioner and Magdalen College: *Routh, Stacey & Castle.*

Solicitor for Great Western Railway Company: *R. R. Nelson.*

(1) (1866) 14 L. T. 352. (2) (1848) 14 Beav. 159, n.; 5 Rail. C. 207.

J. R. B.

KIRBY-SMITH *v.* PARNELL.

BUCKLEY J.

1903

Feb. 5. 6.

[1902 K. 676.]

Will—Construction—Residuary Gift of "Estate and Effects" to Trustees, "their Executors, Administrators and Assigns"—Trusts pointing to Personalty—Realty.

A will contained the following gift: "As to all my ready money, securities for money, stock in any of the public stocks of Great Britain, and all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, I give and bequeath the same and every part thereof to the said K. and S."—whom the testator had already appointed his executors—"their executors, administrators and assigns," upon trusts which related to the income, described as "income" or "interest dividends and annual proceeds" (in some places "produce"), and to corpus described sometimes as "the said trust moneys, stocks, funds, and securities," and in other places as "the said trust moneys." The will empowered the trustees to vary the securities of the trust money and invest the same:—

Held, that the testator's real estate passed by the gift of residue, and that, notwithstanding the suggested inapplicability of the trusts to anything but personalty, those trusts applied also to the real estate—of which there was, therefore, no resulting trust.

The principles of *D'Almaine* v. *Moseley*, (1853) 1 Drew. 629, *Fullerton* v. *Martin*, (1853) 22 L. J. (Ch.) 893, and *Saumarez* v. *Saumarez*, (1839) 4 My. & Cr. 331; 48 R. R. 116, held to be applicable.

Dunnage v. *White*, (1820) 1 Jac. & W. 583; 21 R. R. 239, *Coard* v. *Holderness*, (1855) 20 Beav. 147, and *Longley* v. *Longley*, (1871) L. R. 13 Eq. 133, distinguished.

GEORGE SMITH made his will, dated December 19, 1839, as follows (1):—

"I constitute and appoint John Blake Kirby, of 9, Devonshire Street, Portland Place, in the parish of St. Marylebone in the said county of Middlesex, esquire, and John Smith, of Christ's College in the University of Cambridge, clerk, executors of this my will. And I desire that my remains may be interred in Bicester Church, in the same vault with my father and mother. And I direct that the expenses of my funeral and of proving this my will, and all the just debts which I shall owe at the time of my decease, may be paid and satisfied

(1) The words printed in italics are so printed for convenience in reading the judgment.

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as soon as conveniently may be after my decease. And as to *all my ready money, securities for money, stock in any of the public stocks of Great Britain, and all the rest, residue, and remainder of my estate and effects* whatsoever and wheresoever, I give and bequeath the same and every part thereof unto the said John Blake Kirby and John Smith, their executors, administrators and assigns, upon trust that they, the said trustees or trustee for the time being of this my will, do and shall from time to time, so long as my said wife Augusta Smith shall live and continue my widow, pay and apply the *interests dividends and annual proceeds of the said trust moneys, stocks, funds, and securities* to such person or persons and for such intents and purposes as the said Augusta Smith shall from time to time by any writing or writings under her hand (but not so as to dispose of or affect the same in the way of anticipation) direct or appoint, and in default of such direction or appointment into her own hands. And after the decease or second marriage of her the said Augusta Smith, which shall first happen, I direct that *the said trust moneys* shall be upon trust for all and every of the children or child of me the said George Smith by my said wife Augusta Smith who being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall live to attain that age or be married under that age, equally to be divided between or amongst such children, and if there should be but one such child upon trust for such only child absolutely, with the benefit of accruer and survivorship amongst them. I direct that *the interest dividends and annual produce* of each such child's expectant share to be, during the suspense of vesting, applied for his or her maintenance, education, and benefit at the discretion of my trustees. Provided always, and I hereby further declare, that it shall be lawful for the said trustees or trustee for the time being to pay, transfer, or apply any part or parts of the presumptive portion or share of each or any of the children of me the said George Smith by my said wife Augusta Smith for his or her respective advancement or preferment in the world as the same trustees or trustee shall in their or his discretion think proper, notwithstanding such

child shall not have acquired or shall not live to acquire a vested interest in such portion under the trusts aforesaid. And I hereby declare my will and mind to be that in case I have no child by my said wife Augusta Smith who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then, on such default and failure of children, they the said trustees or trustee for the time being of this my will do and shall from time to time and until the death or marriage again of her the said Augusta Smith, which shall first happen, pay and apply *the interests and dividends and annual produce of the said trust moneys, stocks, funds, and securities* unto and for the use and benefit of her the said Augusta Smith until she shall depart this life or marry again, which shall first happen, and from and immediately after the said Augusta Smith shall so marry again, and in case she the said Augusta Smith and the person with whom she shall intermarry shall previously to such marriage execute a settlement of and concerning *the interest dividends and annual produce of the said trust moneys, stocks, funds, and securities* to accrue during such coverture, shall be settled for the sole and separate use of the said Augusta Smith, and with a clause against anticipation and according to the trust, for the sole and separate use of the said Augusta Smith hereinafter next mentioned therein, but not otherwise, upon trust that they the trustees or trustee for the time being of this my will do and shall pay and apply *the interest dividends and annual produce of the said trust moneys, stocks, funds, and securities* to such person or persons and for such intents and purposes as the said Augusta Smith shall from time to time, notwithstanding such her coverture, by any writing or writings under her hand (but not so as to dispose of or affect the same in the way of anticipation) direct or appoint, and in default of such direction or appointment unto her own hands for her sole and separate use and benefit independently and exclusively of such husband with whom she the said Augusta Smith may so intermarry, and without being in anywise subject to his debts, control, interference, or engagements, and the receipt of the said Augusta Smith or of her appointees,

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notwithstanding her coverture, to be from time to time sufficient discharges for the same. And from and after the decease of such husband, in case the said Augusta Smith shall survive him, then upon trust that the trustees or trustee for the time being do and shall from time to time and until the death or marriage again of her the said Augusta Smith, which shall first happen, pay and apply *the interest dividends and annual produce of the said trust moneys, stocks, funds, and securities* unto and for the use and benefit of her the said Augusta Smith until she shall depart this life or marry again, which shall first happen. Provided also that if I leave no child who shall live to attain a vested interest under the trusts hereinbefore declared, and after the death of my said wife Augusta Smith, and in the event of any coverture or covertures to be contracted by her after my decease, *the income of the said trust moneys, stocks, funds, and securities* shall not previous to such coverture be settled for the sole and separate use and benefit of my said wife Augusta Smith upon the trusts hereinbefore declared concerning the same, then and in either of the above cases I give and bequeath *the said trust moneys* unto my brother the Reverend John Smith, his executors, administrators and assigns. And I authorize and empower the trustees of this my will to change and vary *the securities of the trust money* and invest the same in Government or real securities at interest at their discretion. And I declare that if any of the trustees for the time being of this my will shall depart this life or desire to be discharged of and from or become incapable to act in the trusts aforesaid, then and so often a new trustee shall or may be appointed in his place or stead by the trustee or trustees surviving or continuing to act or by the last acting trustee, his executors or administrators, *and the said trust moneys, stocks, funds, and securities* shall from time to time be transferred so as to be vested in the names of the trustees for the time being, and every new trustee shall or may act in the management or execution of the trusts of this my will, and shall and may exercise the same powers and discretion in all respects as if he had been originally appointed a trustee of this my will. And lastly I declare that the executors or trustees

for the time being of this my will shall not be answerable for one another or for any more money than they shall actually receive, and by no means for involuntary losses, and they respectively shall be allowed and may retain out of the moneys which shall come into their respective hands all costs and expenses which they shall sustain or incur in the execution of the trusts and purposes of this my will. And I hereby revoke all former and other wills by me at any time heretofore made."

By a codicil dated March 5, 1873, Augusta Smith, the testator's widow, and G. F. Kirby-Smith, his only child, were appointed executrix and executor in addition to J. Smith, Kirby having died.

The testator died on June 14, 1878, seised in fee simple of land and houses.

On his death Augusta Smith entered into possession of the real estate, and continued in possession until her death on July 12, 1901, without having been remarried. On her death John Parnell, as her legal personal representative and devisee in trust, entered into possession, and retained possession until the trial of the action.

George F. Kirby-Smith attained twenty-one, and died intestate and without having had issue on May 11, 1884. John Smith died on May 12, 1891, having by his will devised and bequeathed all his real and personal estate to J. J. Kirby-Smith and W. J. Hall. J. J. Kirby-Smith was also the testator's heir-at-law.

J. J. Kirby-Smith and W. J. Hall on August 7, 1902, brought an action against Parnell, claiming that they were, or that J. J. Kirby-Smith was, on the true construction of George Smith's will, entitled to his real estate.

The defendant pleaded that the claim was barred by the Real Property Limitation Act, 1874, and the Real Property Limitation Act, 1833.

The action was tried on February 5 and 6, 1903.

Astbury, K.C., and *W. A. Peck*, for the plaintiffs. The question whether the defence of the Statutes of Limitations is available does not arise if the real estate passed by the will, and

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the trusts declared are not confined to the personalty. The real estate does pass, and the trusts apply to it. *Dunnage* v. *White* (1) is an authority in our favour as to the real estate passing. It was there held, but on different words, that there was a resulting trust of the realty. That case was followed in *Longley* v. *Longley*. (2) It is immaterial whether the testator had or had not real estate at the date of the will: *Lloyd* v. *Lloyd*. (3) *D'Almaine* v. *Moseley* (4) is a distinct authority in our favour, especially with reference to the use of the word "estate." *Fullerton* v. *Martin* (5) also supports the plaintiffs' case with reference to the use of the words "estate" and "give" and the immateriality of the absence of a trust for sale. Throughout the will the testator uses different descriptions of the same corpus, which are sufficient to shew that the trusts attached to everything comprised in the original gift.

[They also referred to *In re Garnett Orme and Hargreaves' Contract*. (6)]

Buckmaster, K.C., and *J. M. Gover*, for the defendant. The real estate did not pass by the will. The word "devise" is not used, and there are no words of limitation applicable to real estate. On the other hand, everything which is given is given to the trustees, their "executors, administrators and assigns." Then there is no trust for or power of sale, which would be necessary in order that real estate could be turned into something susceptible of investment. The expressions of this will and its contents generally are very similar to those of the will in *Coard* v. *Holderness* (7), where it was held that the realty did not pass. In *D'Almaine* v. *Moseley* (4) there was different language in several respects, and there was no reference to executors and administrators. In *Fullerton* v. *Martin* (5) the general scope of the will was not so inconsistent with a gift of realty as is the will in the present case. A gift of "estate and effects" to trustees, their "executors, administrators and assigns," was held insufficient to pass realty in *Doe* v. *Buckner* (8);

(1) 1 Jac. & W. 583; 21 R. R. 239.
(2) L. R. 13 Eq. 133.
(3) (1869) L. R. 7 Eq. 458.
(4) 1 Drew. 629.
(5) 22 L. J. (Ch.) 893.
(6) (1883) 25 Ch. D. 595.
(7) 20 Beav. 147.
(8) (1796) 6 T. R. 610; 3 R. R. 278.

and a similar decision on similar words was arrived at in *Pogson* v. *Thomas* (1); and see Theobald on Wills, 5th ed. p. 193.

Even if the real estate passed by the original gift, the subsequently declared trusts are applicable only to personalty, and there was therefore a resulting trust of the realty: *Dunnage* v. *White* (2); *Longley* v. *Longley*. (3)

[They also referred to *In re Holloway*. (4)

BUCKLEY J. referred to *Saumarez* v. *Saumarez*. (5)]

BUCKLEY J. This testator, having made his will on December 19, 1839, left it untouched except by a codicil dated March 5, 1873, by which he altered the appointment of his executors. He died on June 14, 1878. At the time of his death he was entitled to certain real estate which, I understand, he had acquired between the date of his will and that of his codicil. Whether at the date of the will he had any real estate has been left open. It has been suggested that he had, but I have no certain knowledge one way or the other.

The question which I have to determine is whether, on the testator's death, his real estate passed by the will. The plaintiffs say that it did. The defendant says that it did not, and says further that even if it did pass by the will to the testator's trustees, the subsequent trusts in the will were directed only to the personal estate, that there were no trusts applicable to real estate, and that there was a resulting trust of the real estate.

Before going through the contents of the will I desire to state the principles which I think ought to be applied, and to refer to some of the cases cited which seem to me to have a bearing upon the question.

The principles to be applied are these. First, I ought to read the whole of the will and from it ascertain the testator's intention. Secondly, in ascertaining the intention, I ought to a certain extent—we all know what the expression means—to lean against an intestacy, and not to presume that the testator meant to die intestate if, on a fair construction, there is reason

(1) (1840) 6 Bing. N. C. 337; 54 R. R. 812.

(2) 1 Jac. & W. 583; 21 R. R. 239.

(3) L. R. 13 Eq. 133.

(4) W. N. (1888) 206; 60 L. T. 46.

(5) 4 My. & Cr. 331; 48 R. R. 116.

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for saying the contrary. Thirdly, where the testator uses technical words, I must give them their due effect, unless I find that in the mouth of the testator they have some other meaning. Fourthly, I must apply any established rule of construction which has been adopted by the Court.

As regards that last head, it seems to me that the relevant established rules of construction, or some of them at any rate, are to be found in what Kindersley V.-C. said in *D'Almaine* v. *Moseley*. (1) The Vice-Chancellor says this: "The general principles applicable to cases of this sort are well established: the difficulty is not in ascertaining the principles, but in their application; one rule is, that the word *estate* simply, is sufficient to pass *real estate*; but in most cases the word *estate* is not used simply; and another rule is, that, supposing there is nothing in other parts of the will to control the meaning of the gift, the effect of the word *estate*, coupled with other words, is this: if the other words would without the word *estate* not be sufficient to pass the whole personal estate, the word *estate* will be considered as used to effect a complete passing of the *personal estate*; but if the other words are sufficient to pass *all* the personal estate, then the word *estate* must be read as intended to apply to *real* estate. It is equally clear that, consistently with the general principles, there may be words in the will which shew that the language used may have an interpretation different from their ordinary and proper interpretation; but the rule being that the word *estate* is sufficient to pass real estate, and the other word used in this case being *effects*, which is sufficient to pass *all* the personal estate, so far as the language is considered, primâ facie the word *estate* here would comprise the *real estate*; and unless there is something in the will to shew a clear indication of intention to use the word *estate* in a sense different from its ordinary legal sense, it must be read in that sense. The cases on this subject are very numerous, and not very easy to be reconciled, but the tendency of modern decision is to give less effect to minute and trivial matters than was attributed to them in former times." Then a little further

(1) 1 Drew. 629, 632.

on the Vice-Chancellor says (1): "The next point made is, that in the language used for giving the residuary property, the word *devise* does not occur. I think that also is no indication of intention: the word *give* is quite as efficient as the word *devise* to pass real estate, and is of quite as frequent use. Next, it is said that there are no words of limitation to the heirs; but neither are there to the executors; so that no particular intention can be gathered. It can no more be said that it was intended by omitting a limitation to heirs to exclude real estate, than that by the omission of a gift to executors it was intended to exclude personal estate." When I come to the will before me, it will be found that several of the observations there made will be applicable to this case.

The other passage which I desire to read is addressed rather to the second argument of the defendant, namely, that assuming that the word "estate" in the will passes the real estate, the trusts subsequently declared are so expressed that they do not apply to the real estate, but only to the personal estate, and that there is a resulting trust of the realty. As to that I read an extract from the judgment of Lord Cottenham L.C. in *Saumarez* v. *Saumarez* (2): "In considering gifts of residue, whether of real or of personal estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against the testator having overlooked some property or interest in the gifts particularly described. If he meant to give the residue of his property, be it what it may, it is immaterial whether he did or did not know what would be included in it; and if so, it cannot make any difference that such ignorance is manifested upon the face of the will, unless the expressions manifesting it are sufficient to prove that the testator did not intend to use the words of gift in their ordinary, extended, and technical sense." And the Lord Chancellor further says (3): "The circumstance of his using expressions and giving directions applicable only to the personal estate, may prove that he did not at the time consider, or was

(1) 1 Drew. 633.

(2) 4 My. & Cr. 331, 339; 48 R. R. 116.

(3) 4 My. & Cr. 340.

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not aware, that this fee would be part of his residue: but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property."

With this general statement of the principles applicable, and before referring to the other cases which are said to have a bearing on the case, I turn to the will before me. [His Lordship read the words of gift of the residue from "And as to" down to "upon trust," and continued:—]

Pausing there, without going on to the trusts, I do not think it is disputed, or can be disputed, that if that were all, those words would be sufficient to pass the real estate. Without the word "estate" there is, in the words I have just read, sufficient to pass all the personalty. Then I find the word "estate." I do not find the verb "devise," but I do find the verb "give"; and, therefore, I find a gift of "all my estate whatsoever and wheresoever." Unless the testator shews somewhere that he does not use the technical word "estate" in its proper meaning, then I conceive, on what I have read from the judgment of Kindersley V.-C., that it is shewn that he has devised all his real estate. Then has that been cut down by what follows? For the moment I do not read the trusts at length. The words of description of the trust property vary from time to time. The testator first speaks of "interests, dividends, and annual proceeds of the said trust moneys, stocks, funds, and securities," and that expression is to be found again four times with the substitution of "produce" for "proceeds." Elsewhere the testator varies the description by speaking of "the income of the said trust moneys, stocks, funds, and securities," which, of course, would be the same thing. In the power to appoint new trustees he speaks of "the said trust moneys, stocks, funds, and securities." Going back, I find that the testator uses from time to time an expression, namely, "the said trust moneys," dropping altogether the words "stocks, funds, and securities," while clearly intending to cover all that which he has described by the longer words. Those words, "the said trust moneys," are

to be found quite early in the will, and again near the end. Towards the end of the will he says: "I give and bequeath the said trust moneys unto my brother, the Reverend John Smith, his executors, administrators, and assigns."

The exact verbal description of the property with which he is dealing is thus varied from time to time. To what then do the trusts declared in his will relate? Reading the longest expression which he ever uses, it is "the interest, dividends, and annual proceeds of the said trust moneys, stocks, funds, and securities." If the original gift is looked at, "the said trust moneys" will correspond to "all my ready money"; "stocks" will correspond to "stock in any of the public stocks of Great Britain," and "securities" will correspond to "securities for money." The word "funds" is not found in the original gift; that is new. What does he mean by the interest dividends and annual proceeds of the said funds? We must bear in mind that all these nouns substantive are subsequently, in his vocabulary, comprehended in the word "moneys." He is not there, with a discriminating mind, distinguishing between what is personalty and what is realty, but he is using in the word "funds" an expression by which he intends to convey all that he has not already particularly mentioned. I cannot read this will through without arriving at the conclusion that this testator meant—whether he has done it or not is another thing—to dispose of everything he had to dispose of. It seems to me that the dominant intention of this will is to dispose of everything. If so, then, applying true principles of construction, I have to see whether, upon the language of his will, the testator has or has not given effect to that intention. It is said he has not done so by reason of the fact that in the description or definition in the subsequent trusts he has not used words wide enough. On the language of this will it appears to me that he has used words wide enough.

Further if the testator has, by his original gift, given his real estate to his trustees, then when he comes to the clause dealing with the appointment of new trustees and the transfer of the trust property to them, you would expect that he would

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use words by which he would say, "Transfer to the new trustees all that was held by the old trustees." In that clause he directs that there shall be transferred "all the said trust moneys, stocks, funds, and securities." If, therefore, the trustees ever took the real estate, he must have intended that there should be a transfer of the real estate, and the thing to be transferred he calls "trust moneys, stocks, funds, and securities." That is a reason for saying that, in this testator's mouth, those words mean, not personal estate only, but real estate also. Again the testator gives power to "vary the securities of the trust money," using the narrowest of his several forms of expression. This must be read as applying to the trust moneys, stocks, and securities. It is not confined to money. If that is so, and "trust money" includes investments, why does it not extend to everything mentioned in the original gift, including the real estate?

I pass to some of the other cited cases. Two of them which most bear on the point were decided by Kindersley V.-C. in 1853. In *Fullerton* v. *Martin* (1) the verbs used were "give and bequeath," and what was given was "all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever" upon trust to invest. It was held that the real estate passed under that residuary gift. The Vice-Chancellor said: "I apprehend that the case of *Doe* v. *Buckner* (2) would be decided differently at the present day, and the grounds of Lord Kenyon's decision would not now be sufficient to warrant such a conclusion"; and later on, with reference to the word "invest," he says (3): "It has been argued that this shews an intention of giving only the personal estate, because real estate cannot be invested, and there is no power of sale contained in the will. I confess there does not appear to me to be any weight in this argument. It is quite true you cannot invest real estate without first selling it, nor could you invest leaseholds without doing something to convert them into money, nor could you invest an annuity in the funds without doing the same thing. So, also, there are many other species of personal

(1) 22 L. J. (Ch.) 893, 894. (2) 6 T. R. 610; 3 R. R. 278.
(3) 22 L. J. (Ch.) 895.

property which could not at once be invested without previously being sold. The true meaning of these words must, therefore, be considered as a direction to invest, and to take all proper and necessary means for effecting that object, by first selling it and then investing the proceeds according to the trusts of the will. For these reasons, I do not think there is anything on the face of the will to shew an intention of confining the meaning of the word 'estate,' and I think that the real estate passed under the will."

It is to be noticed there that the Vice-Chancellor sets himself to look for a reason why the word "estate" is cut down from what it primâ facie would mean, and the passage I read is material to this case when one considers the clause as to the variation of investments at the end of the will, because if I once attribute to the testator by implication that the real estate, if he has real estate, is to be or may be converted into money, of course the whole thing becomes simple.

The other decision of Kindersley V.-C. is to be found in *D'Almaine* v. *Moseley* (1), from which I have already read a passage. The gift there was: "As to all the rest and residue of my estate and effects, I give and bequeath the same to W. Moseley, S. Edwards, W. Parkins and W. S. Parnther, in trust to collect, get in, and receive the same, and to invest the same and every part thereof in their names in the 3*l*. per cent. Consolidated Bank Annuities, or other Government stocks or funds, with power to alter, vary, and transpose the same at their discretion, and to pay the interest and dividends" to certain beneficiaries. It was held that the real estate passed. After stating that the words as to collecting, getting in, &c., no doubt would be strictly applicable to personal estate, the Vice-Chancellor says (2): "But in strictness also they are not applicable to certain portions of personal estate, which beyond all question would pass. If the testator had had leaseholds for years, or even for lives, they would be personal estate; and can I say that the use of words not properly applicable to real estate, is an indication of an intention that real estate should not pass, when the very same words are applied to personal

(1) 1 Drew. 629. (2) 1 Drew. 633.

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estate of a certain character, which clearly was intended to pass?" It appears to me that the present case falls within the considerations to which Kindersley V.-C. called attention in *Fullerton* v. *Martin* (1) and *D'Almaine* v. *Moseley*. (2)

But, on the other hand, there is cited in the first place a decision of Sir Thomas Plumer M.R. in *Dunnage* v. *White*. (3) I do not feel pressed with any difficulty as regards that decision. The Master of the Rolls held that the real estate passed, but that there was a resulting trust. The gift was this: "And all the rest, residue, and remainder of my estate or effects whatsoever and wheresoever, of what nature or kind soever, I give, devise, and bequeath unto my said trustees and executors." That plainly passed the real estate. Then the trusts were "to make sale and absolutely dispose of my household goods and stock-in-trade by public auction, for the most money that can be had or gotten for the same. And also do and shall, with all convenient speed, collect in all debts due and owing to me at the time of my decease, together with all moneys owing or belonging to me upon mortgage, bond, bill, note, specialties, simple contract, or otherwise howsoever, and when the same shall be so collected and got in, to divide the same," and pay the divided sums among certain persons. All that the Master of the Rolls held—as I should have thought was pretty plain on those words—was that the testator had specifically said: "What I give away is what my household goods sell for, and what can be got in by collecting my debts and moneys owing on mortgage," and he had given nothing more away. That is the whole explanation of *Dunnage* v. *White* (3), as it appears to me.

Then, with regard to *Coard* v. *Holderness* (4), all that I can get from it is that the whole will must be read, and that if you find by the words which the testator has used that he meant a particular thing, you must give effect to that construction The head-note [which his Lordship read] substantially represents what Lord Romilly held. In other words, in that particular instrument there were so many indications of

(1) 22 L. J. (Ch.) 893.
(2) 1 Drew. 629.
(3) 1 Jac. & W. 583; 21 R. R. 239.
(4) 20 Beav. 147.

intention to confine the gift to personal estate that Lord Romilly gave effect to that intention. No general principle can be deduced from the case; it is nothing but a result arrived at on the particular instrument. Then I may refer to *Lloyd* v. *Lloyd* (1), where Lord Romilly commented on his decision in *Coard* v. *Holderness*. (2) He says the testator "does not use . . . . the words 'executors and administrators' which were relied on in *Coard* v. *Holderness* (2); and not only that, but he speaks of the income of his residuary estate." So that Lord Romilly takes the view that he only decided *Coard* v. *Holderness* (2) on the particular expressions there used.

In *Longley* v. *Longley* (3) the judgment is very brief. Lord Romilly simply followed *Dunnage* v. *White* (4), and held that, there being the word "devise" and the word "heirs," the real estate passed, but that the trusts were "rigidly and exclusively applicable to personal property"—in which case nobody would dispute that the real estate would be undisposed of.

Those are substantially all the cases which have been referred to. It was said that if I arrived at the conclusion at which I have arrived I should be giving the go-by to authorities which govern this case. I disclaim any such intention. *Coard* v. *Holderness* (2) and *Longley* v. *Longley* (3) were decided on the particular facts, and *D'Almaine* v. *Moseley* (5) and *Fullerton* v. *Martin* (6) were decided on principles which are perfectly well founded and which bind me.

I hold, therefore, that the testator did intend to pass his real estate, that he has used language which is capable of passing it, that the gift of real estate takes effect, and that the plaintiffs are entitled to it.

Solicitors for plaintiffs: *Griffith & Gardiner, for Bignold & Pollard, Norwich.*

Solicitors for defendant: *Crowders, Vizard & Oldham, for Dennis & Faulkner, Northampton.*

(1) L. R. 7 Eq. 458, 460.
(2) 20 Beav. 147.
(3) L. R. 13 Eq. 133.
(4) 1 Jac. & W. 583; 21 R. R. 239.
(5) 1 Drew. 629.
(6) 22 L. J. (Ch.) 893.

F. E.

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Feb. 6, 13.

In re THE HARROGATE ESTATES, LIMITED.

Company—Debentures—Series of Debentures—Covering Deed—Subsequent Issue—Registration—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

On November 18, 1901, the company passed resolutions creating a series of debentures to rank pari passu. On December 13 a covering deed was executed. On December 31 the deed and ninety-nine debentures which had been already issued were carried in for registration, together with particulars which gave the date of the deed, the total amount secured, a description of the property and the names of the trustees, but by mistake stated that the resolutions were passed on December 13, 1901. The deed and the debentures, each of which also contained a charge, were registered, and the registrar gave a certificate to that effect. On two subsequent occasions the company registered other debentures of the series, and received certificates which referred to the deed, described the debentures, and stated that they had been registered. On the last occasion, namely, on January 1, 1903, the registrar refused to register other debentures of the same series on the ground that more than twenty-one days had elapsed since their issue.

The company moved for an order to rectify the mistake in the date of the resolutions, and for an extension of the time for registering the debentures which had been rejected:—

Held, that the mistake must be corrected, and that the result of the correction would be to make the first registration valid under sub-s. 4 of s. 14 of the Companies Act, 1900; that no further registration of debentures subsequently issued was necessary; and that no order for extension of time need be made.

Observations on the scope and effect of s. 14 of the Companies Act, 1900.

On November 18, 1901, a company called the Harrogate Estates, Limited, passed resolutions creating a series of 150 debentures of 100*l.* each, ranking equally. On December 13, 1901, a trust deed for securing the debentures by way of floating charge on the real and personal property of the company was executed, and thereupon ninety-nine debentures forming part of the series were issued to purchasers. Each of these debentures also contained a charge. On December 31, 1901, both the covering deed and the ninety-nine debentures were carried in for registration, together with particulars supplied by the company's solicitors, on form No. 47 of the

official forms, which gave the date of the creation of the charge or covering deed as "Trust deed. 13th December, 1901." Amount secured, "15,000*l.*" Date of resolutions, "13th December, 1901." Then followed a description of the property and the names of the trustees. Under the heading "Where more than one issue of debentures in the same series," the date of present issue was stated to be "13th December, 1901"; amount of present issue, "9900*l.* of 99 debentures of 100*l.* each, Nos. 1 to 99 inclusive." Total amount previously issued, "None."

In these particulars the date of the resolutions was by mistake given as December 13, 1901, instead of November 18, 1901.

The deed and the ninety-nine debentures were registered, and the registrar gave a certificate to that effect.

On March 7, 1902, the company registered six other debentures of the same series, the particulars being given in a similar way, and obtained a certificate.

On January 1, 1903, the company applied for registration of ten further debentures; particulars were given on a similar form, the mistake in the date of the resolutions being corrected, and a certificate obtained. At the same time the registrar refused to register thirty other debentures on the ground that more than twenty-one days had elapsed since the date of their issue.

The company applied by motion for an extension of the time for registering the thirty debentures, and the notice of motion was amended so as to ask for rectification of the mistake in the particulars.

Maugham, for the company. We ask the Court to correct under s. 15 the mistake which has been made in the date of the resolutions; and, secondly, to extend the time for registering these thirty debentures. We have to register each debenture of the series as it is issued, for each debenture contains a charge.

[BUCKLEY J. No. Where the registration is made in

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accordance with sub-s. 4 of s. 14 (1), it gives full protection to other debentures of the series subsequently issued, and the

(1) Sect. 14: "(1.) Every mortgage or charge created by a company after the commencement of this Act and being either—

"(*a*) a mortgage or charge for the purpose of securing any issue of debentures; or

"(*b*) a mortgage or charge on uncalled capital of the company; or

"(*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

"(*d*) a floating charge on the undertaking or property of the company,

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured.

"(2.) Where the mortgage or charge comprises property outside the United Kingdom, it shall, so far as that property is concerned, be sufficient compliance with the requirements of this section, if a deed purporting to specifically charge such property be registered notwithstanding that further proceedings may be necessary to make such mortgage or charge valid or effectual according to the law of the country in which such property is situate.

"(3) The registrar shall keep, with respect to each company, a register in the prescribed form of all such mortgages and charges created by the company after the commencement of this Act, and requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

"(4.) Provided that where a series of debentures containing any charge to the benefit of which the debentureholders of that series are entitled pari passu is created by a company, it shall be sufficient to enter on the register—

"(*a*) the total amount secured by the whole series; and

"(*b*) the dates of the resolutions creating the series and of the covering deed, if any, by which the security is created or defined; and

"(*c*) a general description of the property charged; and

"(*d*) the names of the trustees, if any, for the debentureholders.

"(5.) Where more than one issue is made of debentures in the same series, the company may require the registrar to enter on the register the date and amount of any particular issue, but an omission to do this shall not affect the validity of the debentures issued.

"(6.) The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section,

debentures themselves need not be registered. Therefore it is unnecessary to extend the time.]

The form used for registration does not shew that it is under sub-s. 4; so we cannot safely rely on that. There should be a certificate that the whole series has been registered to enable us to comply with sub-s. 6 and indorse on the debenture a statement that it has been registered. If that sub-section does not apply to this case, we are entitled to a certificate that the registration has been completed in accordance with sub-s. 4. The company has to supply the particulars; but the registrar is not obliged to enter all of them on the register, and he ought to give a certificate that that has been done; or we ask for a declaration to that effect.

J. Fulton Carr, for the trustees of the deed.

BUCKLEY J. Applications under s. 15 of the Companies Act, 1900, to extend the time for registration of securities are so frequent that it is, I think, desirable to express the view which I take of the true construction of s. 14. I do so necessarily subject to further consideration after argument in any

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stating the amount thereby secured (which certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with), and the company shall cause a copy of the certificate so given to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered.

"(7.) It shall be the duty of the company to register every mortgage or charge created by the company and requiring registration under this section, and for that purpose to supply the registrar with the particulars required for registration; but any such mortgage or charge may be registered on the application of any person interested therein.

"(8.) The register kept, in pursuance of this section, of the mortgages and charges of each company shall be open to inspection by any person on payment of the prescribed fee, not exceeding one shilling for each inspection.

"(9.) Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under this section, to be kept at the registered office of the company, and to be open to inspection by the members and creditors of the company on payment of such fee, not exceeding one shilling for each inspection, as may be fixed by the regulations of the company. Provided that in the case of a series of uniform debentures a copy of one such debenture shall be sufficient."

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case in which a question may arise in a concrete form. But those who are interested in these applications seem so often to misunderstand the date as from which the time for registration runs, that I think it will be convenient at any rate to make a general statement.

The sequence of the relevant events is commonly as follows: First, the company passes a resolution resolving to issue a debenture or a series of debentures, or to execute a trust deed for securing debentures. The resolution of course creates no charge. It is but the determination by the company that it will thereafter give a charge. Secondly, (*a*) a debenture or debentures are issued—that is to say, money is paid to the company and an instrument under the company's seal is handed to the subscriber; or (*b*) a trust deed is executed for securing a series of debentures by which a charge is expressed to be given to trustees to secure sums to be thereafter advanced upon debentures, and in this latter case debentures are subsequently issued against the payment of money to persons who thereupon become entitled to a charge. Thirdly, some instrument or particulars are sent in for registration. The question is whether at that time the twenty-one days mentioned in s. 14, sub-s. 1, has run.

Sect. 14 deals, I think, in sub-ss. 1, 2, and 3, with the case where a charge is created in favour of a person either named in the debenture, or who can be named because he is the bearer of the debenture, and who becomes entitled to the charge. The twenty-one days in s. 14, sub-s. 1, runs from the date at which a person so becomes entitled. Sub-s. 1 speaks of a charge "created," and of a "security thereby conferred." Sub-s. 3 speaks of a charge "created," and provides for registration of the name of the "person entitled to the charge." Sub-s. 2 deals with the case where owing to the property being abroad it is impossible effectually to charge it without further proceedings (presumably in the foreign country). In such case the registration of a deed "purporting to specifically charge" the property is to suffice.

The twenty-one days in s. 14, sub-s. 1, run from the date,

not of the resolution which authorized the charge, but from the date at which the charge was created in favour of a person entitled to the benefit of the charge.

Sub-s. 4 contains a proviso which allows a different thing to be done, and it is this. Where a series of debentures is created, whether accompanied by a covering deed or not, the Act allows of the registration, not of the charge, but of the resolution creating the series, and (if there be a covering deed) of the covering deed, by which the security is not necessarily "created," but may be "defined." At the date of registration that deed may be a deed securing, not any advances made, but advances to be made in case the debentures are thereafter taken up. Registration made as provided by sub-s. 4, and giving the relevant particulars specified in (*a*), (*b*), (*c*), and (*d*), will protect debentures subsequently issued, notwithstanding the fact that the charge contained in the debentures, or given by the covering deed to the debentures, has at the date of registration not yet arisen (in that no debentures have at that date been issued), and will not arise until their subsequent issue. Sub-s. 4 does not name any new period of twenty-one days running from the date of the resolutions or the date of the covering deed; s. 14, sub-s. 1, is still the sub-section which governs the matter as regards time. The registrar ought, I think, to register under sub-s. 4 at any time irrespective of the date of the resolutions or of the covering deed. Such registration will protect all debentures subsequently issued, and all debentures issued not more than twenty-one days before registration, but will not protect debentures issued at an earlier date. In this sub-section the words "debentures containing any charge" are, I think, equivalent to debentures which have the benefit of a charge. The case in which the charge is contained in the covering deed only, and not repeated or extended by the debentures themselves, is, I think, within the sub-section.

Sub-s. 5 relates, I think, to the case where registration has been made under sub-s. 4, and provides that the registrar may be required to register the date and amount of any particular issue of some part of the series; but this is not essential for the validity of the debentures.

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Sub-s. 6 relates to a certificate which the registrar of course cannot give until the registration has been effected. Yet it provides for a copy of the certificate being indorsed on every debenture which is issued by the company the payment of which is secured by the charge. This shews that there may be an effectual registration before a charge has been created by the issue of the debenture. This is consistent with the interpretation which I place upon sub-s. 4. As regards the certificate itself, it ought, I think, to assume a different form according as the registration is made under sub-ss. 1, 2, and 3, or under sub-s. 4. If it be made under sub-ss. 1, 2, and 3, it will be a certificate of the registration of the particular mortgage or charge which is brought in for registration and is registered. If it be a case where registration is made under sub-s. 4, then the registrar ought to certify that there have been registered the particulars required by sub-s. 4 (*a*), (*b*), (*c*), and (*d*), inserting the particulars relevant to the case before him.

From the applications which come before me it would seem that sufficient attention has not at present been directed to the facilities which are provided for registration by sub-s. 4. If that registration is made, it is unnecessary, as each debenture is subsequently issued, that the parties should see to the registration of the debenture itself within the twenty-one days mentioned in sub-s. 1.

The particular case which is before me is this. There were resolutions passed on November 18, 1901, creating a series of 150 debentures of 100*l.* each, making 15,000*l.* in all. The debenture itself contained a charge, and a trust deed, which was executed on December 13, 1901, for securing the issue also contained a charge, upon all the real and personal property of the company. On December 31, 1901, that deed was carried in for registration, and at the same time there were sent in for registration ninety-nine of the debentures which had, as between December 13 and 31, actually been issued—by which I mean that some persons had paid money and had received the debentures. The particulars which were carried in would, I think, have been sufficient for complying with sub-s. 4 but for an

unfortunate mistake by which the date of the resolutions creating the series was given as December 13, which was the date of the deed, when it ought to have been November 18, which was the date of the resolutions. Under s. 15, where there is a misstatement which is shewn to be due to inadvertence, I have jurisdiction to order that the misstatement be rectified. Under this section it seems to me that I can, and I do, make an order rectifying the register by substituting November 18 for December 13 as the date of the resolutions. If that be done, I have then, on the particulars which were carried in, the total amount secured by the whole series—15,000*l.* I have accurately, when the error is corrected, the date of the resolutions creating the series—November 18, and of the covering deed—December 13, 1901. I have a general description of the property charged, and I have also the names of the trustees. Those are all the particulars required by sub-s. 4. At the same time the parties registered—which I think they need not have done if they had complied with sub-s. 4—the ninety-nine debentures which had been issued. They are none the worse for that, though they might have dispensed with it. They subsequently carried in for registration some more of these debentures which had been issued after the first registration. Now, in my opinion, what the registrar ought to have done then was, not to have required or called for particulars of the mortgage or charge, but to have called for that which would satisfy sub-s. 5—the date and the amount of the particular issue. All the company should have carried in was the statement that on a particular date they issued so many more debentures which were protected by the previous registration, and so with the third set which was subsequently issued, and so with the fourth set. What happened was this. On January 1, 1903, there were carried in for registration forty debentures, of which ten were in time, in the sense that not more than twenty-one days had elapsed since they had been issued to their subscribers; but as to thirty, more than twenty-one days had elapsed; and therefore the registrar refused to register them. It seems to me that no registration was required if the previous registration had been properly

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made—and I think it had been if there is a correction of the mistake—under sub-s. 4. What I propose, therefore, to do on this occasion is to make no order extending the time. It seems to me that no such order is required. I think the parties are at liberty to carry in before the registrar under sub-s. 5 a memorandum in such form as he thinks right, for which there appears to be no form in the office at present, giving the particulars under sub-s. 5, and identifying these debentures as being part of the debentures already protected by the original registration made under sub-s. 4.

Solicitors: *Metcalfe, Birkett & Rowlatt; Goldring & Philips.*

H. C. R.

C. A.
1903
Feb. 14.

RICHARDS *v.* DE WINTON.

[1900 R. 1273.]

RICHARDS *v.* EVANS.

[1900 R. 1388.]

Common Lands—Lands taken for Public Undertaking—Compensation for Commonable Rights—Apportionment—Determination of Persons Interested—Jurisdiction—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18) *s.* 104—*Inclosure Act*, 1854 (17 & 18 *Vict. c.* 97), *s.* 17.

APPEAL against the decision of Kekewich J. (1)

The plaintiff claimed to be solely entitled to commonable rights over parts of two commons which had been taken by a district council for the construction of waterworks. Agreements had been entered into between the council and an agent for the commoners of the two commons respectively, by which the council agreed to pay 40*l.* per acre for the extinction of commonable rights over the lands which they required. Meetings of the commoners had been held under the provisions of the Lands Clauses Consolidation Act, 1845, and the defendants had been appointed committees of the commoners respectively. The defendants had in their hands 3000*l.*, paid by the council for the extinction of commonable rights over the lands taken by them. The plaintiff claimed a declaration that he was entitled to the whole of the 3000*l.*

Kekewich J. held, upon the construction of the sections of the statutes, that the committees of commoners, or in cases of difficulty the Board of Agriculture, were the proper tribunal to determine among what persons and in what shares the compensation should be apportioned, and that the Court had no jurisdiction to entertain the action.

The plaintiff appealed, and during the hearing of the appeal (on May 28 and 29, 1902) the parties agreed to refer to an arbitrator the ascertainment and determination of the name or names of the person or persons who at the date of the taking

(1) [1901] 2 Ch. 566.

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were entitled to commonable rights in or over the lands taken, and the nature and extent of their interests, and the appeal was ordered to stand over. (1)

By his award the arbitrator found that all owners of freehold farms within the parish in which the lands taken were situated were entitled by themselves or their tenants to common of pasture on all common or waste lands within the parish for their sheep, cattle, and ponies as appurtenant to their several farms; the schedule contained the names of seventeen different owners of thirty-two farms who were entitled to rights of common.

1903. Feb. 14. The appeal came again before the Court on the arbitrator's award.

Upjohn, K.C., and *R. Rowlands*, for the plaintiff.

S. T. Evans, K.C., *John Lloyd*, and *R. J. Parker*, for the defendants.

THE COURT (Vaughan Williams, Romer, and Stirling L.JJ.) dismissed the appeal upon the finding of the arbitrator without giving judgment upon the question of jurisdiction decided by Kekewich J.

Solicitors: *Schultz & Son, for Gwilym James, Charles & Davies, Merthyr Tydfil; Sharpe, Parker & Co., for D. T. Jeffreys, Brecon.*

(1) See W. N. (1902) 113.

W. J. B.

BENNETT *v.* STONE.

[1899 B. 2648.]

C. A. 1902 Nov. 4, 6, 7, 27. 1903 Feb. 3.

Vendor and Purchaser—Contract for Sale of Real Estate—Non-completion on Appointed Day — Interest on Purchase-money — "Wilful Default" of Vendor—Dispute as to Form of Conveyance—Specific Performance — Account of Rents and Profits received by Vendor—Land in Occupation of Vendor—Occupation Rent.

An agreement dated September 26, 1898, for the sale of land provided that, if from any cause whatever, other than wilful default on the part of the vendors, the completion of the purchase should be delayed beyond January 2, 1899, the purchase-money should bear interest at 5 per cent. per annum. The title having been accepted, a dispute arose about the form of the conveyance, and the purchase was not completed on the day fixed. On June 12, 1899, the vendors threatened in effect that, if the purchaser did not within ten days assent to the form of conveyance which they proposed, they would cancel the contract and forfeit the deposit. On June 22, 1899, the purchaser commenced an action for specific performance of the contract. At the trial on February 2, 1900, Buckley J. held that the purchaser was in the right as to the form of the conveyance, and gave judgment for specific performance, with costs up to the date of the judgment. The judgment directed that interest (if any) should be computed on the balance of the purchase-money from January 2, 1899, and that an account should be taken of the rents and profits of the land received by the defendants since January 2, 1899; and it was ordered that what should be coming on the account of rents and profits should be deducted from the amount of the purchase-money and interest when computed. On a motion by the plaintiff to vary the master's certificate, Buckley J. held that there had been no "wilful default" by the vendors, and that, even if there had been, the delay in completion was due, not to the default, but to the inability of the purchaser to find the money to complete the purchase, and consequently that the purchaser must pay interest on the balance of the purchase-money from January 2, 1899, down to completion :—

Held, by Stirling and Cozens-Hardy L.JJ. (Vaughan Williams L.J. dissenting), that either there had been no wilful default by the vendors, or, if there had been, the delay in completion was not due to the default, and that the decision as to payment of interest was right.

Per Vaughan Williams L.J. The delay was caused by wilful default on the part of the vendors, and the purchaser ought not to pay interest.

Per Stirling L.J. There had been wilful default on the part of the vendors, but it was not the cause of the delay.

Per Cozens-Hardy L.J. There had been no wilful default on the part of the vendors.

Decision of Buckley J., [1902] 1 Ch. 226, affirmed.

Per Vaughan Williams L.J. *In re Woods and Lewis' Contract*, [1898]

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1 Ch. 433; [1898] 2 Ch. 211, has left untouched the proposition laid down by Bowen L.J. in *In re Young and Harston's Contract*, (1885) 31 Ch. D. 168, 174–5, and also the observations of Lindley L.J. in *In re Hetling and Merton's Contract*, [1893] 3 Ch. 269. Nor did Lindley L.J. in *In re London Corporation and Tubbs' Contract*, [1894] 2 Ch. 524, qualify the definition of "wilful default" given by Bowen L.J. in *In re Young and Harston's Contract*, 31 Ch. D. 174–5.

Per Stirling L.J. In *In re London Corporation and Tubbs' Contract* the Court of Appeal did not intend to depart from the general rule laid down in *In re Young and Harston's Contract*. Nor was it intended to lay down that every case of honest mistake by a vendor is outside that rule. So to hold would be inconsistent with *In re Hetling and Merton's Contract*.

Per Stirling and Cozens-Hardy L.JJ. As regards wilful default, there is no distinction between a mistake of the vendor as to title and a mistake as to evidence of title or as to conveyance.

The judgment at the trial directed that an account should be taken of rents and profits received by the vendors. Part of the property was in the occupation of the vendors:—

Held, that the vendors were not chargeable with occupation rent for that part of the property which was in their occupation.

Decision of Buckley J. affirmed.

APPEAL from the decision of Buckley J. (1)

The following statement of the facts is taken (with a few additional details) from the written judgment of Cozens-Hardy L.J.

By a contract dated September 26, 1898, the defendants agreed to sell and the plaintiff agreed to purchase an estate called the Stoneleigh estate, near Epsom, for 75,000*l.*, of which 1000*l.* was to be paid as a deposit. The balance of 74,000*l.* was to be paid on January 2, 1899, on which day the purchase was to be completed. The contract provided that "time shall be deemed in all respects as of the essence of this clause, and the purchaser, paying his purchase-money at the date aforesaid, shall as from that day be let into possession or into receipt of the rents and profits, and up to that day all rents, rates, taxes, and outgoings shall (if necessary) be apportioned, and if from any cause whatever, other than wilful default on the part of the vendors, the completion of the purchase is delayed beyond the before-mentioned day, and this agreement shall not be

(1) [1902] 1 Ch. 226.

cancelled and the deposit forfeited by the vendors under the last clause hereof, the purchase-money shall bear interest at the rate of 5*l.* per cent. per annum from that day to the day of actual payment thereof."

The deposit was paid, but the purchase was not completed on the day appointed, and had not indeed been completed when judgment was delivered on this appeal. The title was accepted before the end of 1898, but the plaintiff, who was not a man of large means, was not ready with his purchase-money on the day named for completion. The draft conveyance, prepared by the plaintiff without skilled professional assistance, was not in proper form. The defendants from time to time pressed the plaintiff to complete and threatened to rescind. Various alterations were made from time to time in the draft; but on June 21, 1899, the plaintiff finally accepted all the alterations made by the defendants with one exception. This exception related to the insertion of a formal grant of the benefit of certain covenants entered into by one William Cunliffe with the vendors in a deed of exchange which formed part of the title. The purchaser inserted in the draft the following words: "Together with the full benefit of the covenants on the part of the said William Cunliffe with the said Edward Mulready Stone and Frederick William Stone (the vendors) contained in the said indenture of August 29, 1898." The defendants substituted for these words the following: "but with the benefit of the covenants on the part of the said William Cunliffe with the said Edward Mulready Stone and Frederick William Stone contained in the said indenture of August 29, 1898 (so far as the said Edward Mulready Stone and Frederick William Stone are now at law or in equity entitled to assign the benefit of such covenants without thereby warranting that such covenants are now enforceable by the assigns of the said Edward Mulready Stone and Frederick William Stone.)"

The plaintiff objected to this alteration, but the defendants insisted upon it, and on June 12, 1899, the vendors' solicitor wrote to the purchaser's solicitor as follows: "I am instructed by my clients to inform you that, unless you return the draft conveyance to me approved within ten days from this date,

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they will give Mr. Bennett formal notice cancelling the contract and forfeiting the deposit."

On June 21, 1899, the plaintiff's solicitor wrote to the vendors' solicitor, protesting against this threat, and proposing a slight alteration in the words to which the vendors objected, and adding, "if you decline to consider this, I shall assume that you decline to go on with the sale, and shall commence proceedings for the enforcement of the contract." The vendors would not assent to the words proposed by the purchaser, and on June 22, 1899, he issued the writ in this action, claiming thereby specific performance of the agreement for purchase, and that the defendants might be ordered to execute a proper conveyance, including the benefit of the covenants. The statement of claim was delivered on August 29, 1899. The defendants delivered their defence on September 14, 1899, thereby alleging in effect that it was owing to the inability of the plaintiff to find the purchase-money that the purchase had not been completed, and that they were not bound to convey in the form required by the plaintiff. In the course which the defendants took they acted under the advice of counsel. One of the farms on the estate became vacant at Michaelmas, 1899, the tenant having given notice to quit. The farm was not relet, but was occupied by the vendors themselves.

The action was tried by Buckley J. on February 2, 1900. He commenced his judgment thus: "I am of opinion that the parties are fighting about nothing at all." But, although the learned judge did not regard the insertion of the words proposed by the plaintiff as of any real importance, he held that the defendants were wrong in objecting to them; that the plaintiff was entitled to judgment for specific performance; and that the defendants must pay the costs of the action up to the judgment. It was stated to Buckley J. that the title had been accepted, and that the conveyance was settled. Not a word was said by him about interest, or about rents and profits. But the formal judgment was drawn up as follows: "This Court doth declare that the agreement dated September 26, 1898, ... ought to be specifically performed and carried into execution, and doth order and adjudge the same

accordingly. And it is ordered that interest (if any) be computed at the rate of 5 per cent. per annum on the sum of 74,000*l.*, ... the balance of the purchase-money . . . . from January 2, 1899, when the same ought to have been paid according to the terms of the said agreement. And it is ordered that the following account be taken, viz., an account of the rents and profits of the said hereditaments received by the defendants, or by any other person or persons by the order or for the use of the defendants, since January 2, 1899. And it is ordered that what shall be owing on the said account of rents and profits be deducted from the amount of the purchase-money and interest when so computed as aforesaid. And it is ordered that, upon the plaintiff paying to the defendants the balance which shall be certified to be due to them in respect of such purchase-money and interest after such deduction as aforesaid, the defendants do execute a proper conveyance of the said hereditaments comprised in the said agreement to the plaintiff, or to whom he shall appoint, such conveyance to be settled by the judge, in case the parties differ, and deliver up to the plaintiff upon oath all deeds and writings in their custody or power relating to the said hereditaments."

On June 13, 1901, the master made his certificate, by which he charged the plaintiff with interest at 5 per cent. per annum from January 2, 1899, to the date of the certificate. The interest thus charged amounted (less income tax) to 866*l.* 12*s.* 6*d.*, and this, added to the balance of the purchase-money, made an amount of 82,661*l.* 12*s.* 6*d.* due from the plaintiff to the defendants. The certificate also found that a balance of 1020*l.* 8*s.* 10*d.* was due to the defendants on the account of rents and profits, with the result that 83,682*l.* 1*s.* 4*d.* was certified as the ultimate balance due to the defendants for purchase-money and interest.

The plaintiff took out a summons to vary the certificate by declaring that no interest was due to the defendants, and by striking out from the account of rents and profits all farming losses, and by charging the defendants with an occupation rent.

By an order dated November 13, 1901, Buckley J. declined

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to vary the certificate as to interest or occupation rent, but made some variations as to the rents and profits by disallowing to the defendants farming losses. (1) The defendants acquiesced in this decision, but the plaintiff appealed from the order so far as it charged him with interest and failed to charge the defendants with an occupation rent.

In the course of the arguments an attempt was made to effect a compromise between the parties, and the hearing was adjourned for that purpose, but the parties could not agree upon terms.

The appeal came on for hearing on November 4, 1902.

H. Terrell, K.C., and *Sheldon*, for the plaintiff.
Astbury, K.C., and *Dunham*, for the defendants.
H. Terrell, K.C., in reply.

The arguments adduced were in substance the same as those in the Court below, and the same cases were cited.

Reference was also made to the following additional cases: *North* v. *Percival* (2); *In re Earl of Strafford and Maples.* (3)

Cur. adv. vult.

1903. Feb. 3. VAUGHAN WILLIAMS L.J. read the following judgment:—In this case the vendors refused to execute a conveyance, except in a form upon which they were not entitled to insist. The purchaser thereupon brought an action for specific performance and obtained judgment, with costs.

The first question which arises is whether such conduct by the vendors amounts to "wilful default," so as to exempt the purchaser from the payment of interest. This is a question of contract. It is in no sense a question of judicial discretion. If the conduct of the vendors amounts to "wilful default," the contract exempts the purchaser from the payment of interest during the period of delay caused thereby, and the Court has, in my judgment, no jurisdiction to deprive the purchaser of that exemption.

(1) Vide [1902] 1 Ch. 226. (2) [1898] 2 Ch. 128.
(3) [1896] 1 Ch. 235, 240.

In this case the vendors insisted, under threat of cancelling the contract and forfeiting the deposit, upon the purchaser within ten days from June 12, 1899, approving a form of conveyance upon which it was ultimately held that they had no right to insist. The purchaser on June 22 issued his writ in this action for specific performance. He succeeded in the action, and obtained judgment on February 2, 1900. Buckley J. was of opinion that this conduct by the vendors did not amount to "wilful default." I cannot agree. I think that the conduct of the vendors did amount to "wilful default," that is, to a conscious abstention by the vendors from doing that which reasonably they ought to have done. I think that the judgments of Romer J. and the Court of Appeal in *In re Woods and Lewis' Contract* (1) go a long way to consolidate the results of the authorities into one consistent whole. The judgment of Bowen L.J. in *In re Young and Harston's Contract* (2) is the basis of the judgment of Romer J. as well as of the judgments of the Court of Appeal. The outcome of that case, to my mind, is this—that it leaves untouched the proposition of Bowen L.J. that "wilful" "implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will." And I think the case also leaves untouched these words of Lindley L.J. in *In re Hetling and Merton's Contract* (3): "Whatever may be the popular meaning of wilful default, whatever the expression may mean in dealing with other matters, it is now settled that moral delinquency, intentional delay, wilful obstruction on the part of a vendor, may all be absent, and yet there may be wilful default on his part disentitling him to interest under a contract such as that before us." But while the judgments in *In re Woods and Lewis' Contract* (1) affirm the statement of the law just cited from the judgments of Bowen L.J. and Lindley L.J., those judgments also expressly affirm the dictum of Bowen L.J. (4) defining

(1) [1898] 1 Ch. 433; [1898] 2 Ch. 211.
(2) 31 Ch. D. 168, 174–5.
(3) [1893] 3 Ch. 269, 281.
(4) 31 Ch. D. 174.

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"default" thus: "Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction."

Honesty of intention, therefore, will clearly not prevent the act of the vendor from being "wilful," but mere failure to perform will not constitute "default"; to constitute default there must be neglect of a duty, neglect to do something which the vendor ought to have done, having regard to his duty to the purchaser. This view brings the observation of Turner L.J. in *Williams* v. *Glenton* (1) into line, and shews that the proposition established by that case—that mere difficulties of title, although involving a certain degree of default on the part of the vendor, are not sufficient to exempt the purchaser from the payment of interest under the ordinary interest clause—is not an exception grafted by judicial decision on the words of the contract, but is merely an instance in which the Courts have uniformly found that the vendor has not failed in doing what is reasonable under the circumstances.

It was pointed out by Knight Bruce L.J. in *Sherwin* v. *Shakspear* (2) that, "considering the nature of the titles to land according to our institutions and the present course of practice, I think it in general not reasonably to be expected that at the time appointed for the delivery of the abstract an abstract shall be delivered at once, clear of all difficulty, of all doubt, or even of all objection." Knight Bruce L.J. went on to point out that the ordinary clauses in a contract for the sale of land shew that the parties thereto must have contemplated the possibility of a title imperfect at first, or an abstract originally incomplete. This, to my mind, confirms the view that the failure to make title is only an instance in which generally the failure will not involve neglect to do that which the vendor ought reasonably to have done. The conclusions which I have here stated are to a large extent inferences from the terse judgment of the

(1) (1866) L. R. 1 Ch. 200. (2) (1854) 5 D. M. & G. 517, 527.

present Master of the Rolls (then Collins L.J.) in *In re Woods and Lewis' Contract.* (1) I should add that I do not think Lindley L.J. really qualifies the observations of Bowen L.J. by anything which he said in *In re London Corporation and Tubbs' Contract.* (2)

Applying these conclusions to the present case, it was, in my judgment, "wilful" on the part of the vendors to strike out the clause relating to Cunliffe's covenant, but in so doing they did not do anything involving a failure in their reasonable duty as vendors. So far there was no "wilful default." But, in my judgment, to add to this erasure the threat, if it was not accepted, to cancel the contract and forfeit the deposit was a neglect by the vendors to conduct the sale to its completion in the manner in which they ought to have done. This, as the result shews, justified the purchaser in bringing his action for specific performance, and in my judgment the vendors cannot claim interest during the period occupied in bringing the action to a conclusion—that is, from June 22, 1899, to February 2, 1900. To allow them to do so would be to allow them to take advantage of their own wrong. If this were not so, no prudent purchaser would fight his vendor, however unreasonable his claim. The vendor would have a good investment, whatever the result of the action or inquiry. I think it would be lamentable that the liability for interest and the right to it should depend upon the form of the order which the plaintiff accepted.

A great portion of the time occupied by the inquiry was taken up by a claim which the learned judge himself has since decided that the vendors could not support. Here again, to give the vendors interest would be to enable them to take advantage of their own wrong. The conditions in this case are concurrent: the vendor must be willing to convey, and the purchaser must be ready to pay the price. But in such a case the vendor who seeks to recover the interest must shew that he is ready and willing to perform the concurrent conditions, so far as it lies on him to do so.

It was said by Buckley J. that the action ought never to have been brought. The fact that the plaintiff obtained

(1) [1898] 2 Ch. 215. (2) [1894] 2 Ch. 524.

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judgment with costs seems the answer to this. Assume that it was a matter of very little importance to either side whether the conveyance contained the clause demanded by the vendors, this shews how unjustifiable it was for the vendors to insist upon it, with a threat of cancellation and forfeiture.

As to the time occupied by the inquiries ordered, I think that the learned judge ought to have decided the question as to interest by his judgment at the trial. Be this how it may, in my judgment, the vendors cannot have interest for the time occupied by them in making claims which they could not support.

I have only to add that I cannot agree that it has been shewn that the inability of the purchaser was, as Buckley J. put it in his judgment on the motion to vary the certificate, the causa causans of the delay. On the contrary, it seems to me that the proper answer to this is given in the judgment of Buckley J. at the trial of the action. The vendors pleaded that the purchaser was not ready and willing, because he was unable to pay the balance of the purchase-money. Buckley J. delivered judgment in favour of the purchaser for specific performance of the contract, and when Mr. Astbury at the conclusion of the judgment said, "They have had eighteen months and have not been able to find the purchase-money," the learned judge answered, "Because the conveyance was not in a fit form."

If I had myself to draw an inference of fact, I should infer that the purchaser had an extremely good bargain, leaving an ample margin for raising the money, and what occurred in the negotiations when the case was before us confirms this view.

STIRLING L.J. read the following judgment:—In this case Buckley J. has held that the plaintiff (the purchaser) is liable to pay interest on the unpaid balance of his purchase-money, for two reasons—(1.) because the defendants (the vendors) had not been guilty of "wilful default" within the meaning of the contract; (2.) because the real cause of the delay in the completion of the purchase was the default of the purchaser. On the appeal both grounds of decision have been controverted

and have been fully argued, and it is necessary to consider both.

First, has the vendor been guilty of wilful default? According to the rule laid down in the Court of Appeal in *In re Young and Harston's Contract* (1), a vendor commits a default if he fails to do something which he ought reasonably to do, regard being had to the terms of the contract which he has entered into with the purchaser, and is guilty of wilful default if he so fails when he is a free agent, and knows what he is doing, and intends to do what he does. It follows that the vendor may be guilty of wilful default although he may not have any intention of breaking his contract, and this appears to be clearly recognised in the judgment of the Court of Appeal delivered by Lindley L.J. in *In re Hetling and Merton's Contract.* (2) It was subsequently held by the majority of the Court of Appeal in *In re London Corporation and Tubbs' Contract* (3) that the rule laid down in *In re Young and Harston's Contract* (1) does not apply in cases of "honest mistake or oversight," and Buckley J. has held that the present case falls within that category. To ascertain whether this be so the decisions in *In re Hetling and Merton's Contract* (2) and *In re London Corporation and Tubbs' Contract* (3) must be carefully examined.

In *In re Hetling and Merton's Contract* (2) two trustees of a voluntary settlement entered into a contract for sale of a piece of land, which was subject to a mortgage in favour of Petch and Hetling, the latter being a vendor. The purchaser required that Petch should concur. Petch, who was a solicitor, had gone abroad, having given to his partner a power of attorney authorizing him to execute deeds and transfer any property held by him as trustee or mortgagee. The vendors knew of and relied on his power of attorney, but the purchaser declined to complete without a conveyance from Petch himself, and this the vendors after some delay procured. It appeared that the purchaser had his money ready on the day fixed for completion, and kept it ready, without receiving any interest on it.

(1) 31 Ch. D. 168. (2) [1893] 3 Ch. 269.
(3) [1894] 2 Ch. 524.

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The Court held that the purchaser's objection was well founded, and further that the delay in completion was attributable to the wilful default of the vendors, and that they were not entitled to any interest on the purchase-money. So far as appears, the vendors there fell into an honest mistake as to the efficacy of the power of attorney on which they relied. In *In re London Corporation and Tubbs' Contract* (1) the contract for sale contained a statement as to the title of the vendors, which, upon the investigation of the title by the purchaser, proved to be inaccurate as to a portion of the property. The vendors, upon a requisition being made by the purchaser, admitted the inaccuracy, and on the day after that fixed for completion delivered a further abstract of title to this part of the property. It appeared that the vendors had a good title, and the purchaser ultimately accepted it, after a delay of about three months. The question then arose whether the vendors were entitled to interest during this period, and it was held by the majority of the Court (Lindley and Lopes L.JJ.) that they had not been guilty of wilful default, and were consequently entitled to interest. Lindley L.J. put the matter thus (2): "Unfortunately, the title was not examined, or not examined with proper care, before the conditions of sale were framed. This was unquestionably a default, but, in my opinion, it was not 'wilful.' I do not propose to examine this word with scientific accuracy; it is sufficient to observe that to make up one's mind not to verify a statement is 'wilful,' but that simply not to think about verifying it is not wilful." It appears, in my opinion, from the rest of the judgment that the general rule laid down in *In re Young and Harston's Contract* (3) was not intended to be departed from. Further, I do not think that it was intended to lay down that every case of honest mistake lies without that rule; so to hold would, it seems to me, be inconsistent with the decision in *In re Hetling and Merton's Contract.* (4)

I attach great weight to the observations made by Lindley L.J. in *In re London Corporation and Tubbs' Contract* (1)

(1) [1894] 2 Ch. 524.
(2) Ibid. 536.
(3) 31 Ch. D. 168.
(4) [1893] 3 Ch. 269.

on the meaning of the word "wilful"; they appear to me to indicate with sufficient clearness for ordinary purposes how the line is to be drawn in this class of cases. It is important also to observe that there the vendors, in answer to the purchaser's requisitions, admitted their mistake and proceeded to rectify it. The decision, therefore, only covers the case of a mistake honestly made at first, and not persisted in when brought to the vendor's attention. It is a different matter when a vendor has in the first instance been led through honest mistake or inadvertence into some act or omission, which amounts to a default, but persists in it when his attention is called to it. In that state of things it seems to me that a default, originally attributable to mistake and inadvertence, may become wilful.

It was argued before us, as it was in the Court below, that the decision in *In re London Corporation and Tubbs' Contract* (1) only applies when a vendor makes a mistake as to title. I agree with Buckley J. in thinking that this distinction is not well founded. It seems to me that the rule must be the same, whether the mistake of the vendor relates to title, or evidence of title, or conveyance. I wish, however, to point out that not every failure on the part of a vendor to fulfil his contract is a "default"; in each case the circumstances must be looked at, and if it turns out that the vendor, using reasonable care, has failed to observe some matter which gives rise to a proper requisition on the part of the purchaser, but proceeds with reasonable diligence to comply with the requisition, he will not be guilty of a default: *In re Woods and Lewis' Contract.* (2) Further, in my opinion, the circumstances may be such that the vendor will not commit a default unless and until the Court has determined that his contract puts him under an obligation to comply with the purchaser's requisition.

In the present case the default complained of is the refusal of the vendor to execute a conveyance to the purchaser in the form required by him.

From the judgment delivered by Buckley J. at the trial of the action, it appears that the purchaser claimed to be entitled under the contract to the benefit of some covenants entered

(1) [1894] 2 Ch. 524. (2) [1898] 2 Ch. 211.

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into by one Cunliffe with the vendors, by an indenture dated August 29, 1898, and in the draft conveyance, as ultimately tendered by him, there were inserted for the purpose of passing this benefit these words, "Together with the full benefit of the covenants on the part of the said W. Cunliffe with the said E. M. Stone and F. W. Stone contained in the said indenture of the 29th day of August, 1898."

The vendors agreed that the purchaser was to have the benefit of these covenants, and left the words just quoted standing in the draft, as finally approved on their behalf; but they added the words, "so far as the said E. M. Stone and F. W. Stone are now at law or in equity entitled to assign the benefit of such covenants, without thereby warranting that such covenants are now enforceable by the assigns of the said E. M. Stone and F. W. Stone." The purchaser objected to these words, and the vendors, on June 21, 1899, refused to execute a conveyance without them, and persisted in their refusal. Whether they were right in so doing was the only question between them and the purchaser when the action was brought and was tried. The learned judge decided that the vendors were bound to execute a conveyance without the addition on which they insisted. This decision has not been appealed from, and, in my judgment, it was perfectly right.

Then arises the question, Did the vendors act reasonably in refusing to comply with the purchaser's requirements as to the form of conveyance? In my opinion, they did not act reasonably. The learned judge said that the parties were fighting about nothing; meaning, as I understand, merely about a matter of form. The conveyance was prepared by the purchaser, and it was a matter of great importance to him that it should be clearly expressed upon the point as to which the question arose, while in this respect the form was a matter of no importance to the vendors. The vendors therefore, in my opinion, committed a default; they did so deliberately, and, consequently, were guilty of wilful default during part at least of the time subsequent to June 21, 1899.

Secondly. Was the delay in the completion of the purchase attributable to the default of the purchaser? It is admitted

that the purchaser was unable to complete the purchase out of his own moneys, and there is no evidence that he ever found any one to advance the unpaid balance. Buckley J. was of opinion that the real cause of the delay was that the purchaser was not provided with the money to complete his purchase, and I am unable to differ from this conclusion.

Now the contract provides that the purchaser shall pay interest "if from any cause whatever, other than wilful default on the part of the vendors, the completion of the purchase is delayed." Here the real cause of delay was not the wilful default of the vendors, and it appears to me that the purchaser, insisting, as he does, on specific performance of the contract, cannot be relieved from payment of interest. To hold otherwise would, in my opinion, be inconsistent with the decision of the Court of Appeal in *In re London Corporation and Tubbs' Contract* (1), where the same point arose, and all the learned judges agreed that, if the vendors were not guilty of wilful default, the purchaser was liable for interest.

I think, therefore, that on this last ground the appeal fails, and must be dismissed.

COZENS-HARDY L.J. read the following judgment:—This appeal raises an important question as to the effect of the common form clause providing for payment by the purchaser of interest on purchase-money from the day named for completion, except in the case of wilful default on the part of the vendor. The facts are happily such as have not often to be considered by the Court. [His Lordship stated the facts in substance as above down to the judgment at the trial on February 2, 1900, and continued:—]

It is matter for regret that the learned judge was not asked to decide the question of interest at the trial. Under this judgment the plaintiff is entitled in any event to all the rents and profits from January 2, 1899, and not only to the rents and profits during the period in which interest is payable. Mr. Terrell, feeling pressed with the hardship of this, offered at the bar to abandon any such claim. But it seems to me that,

(1) [1894] 2 Ch. 524.

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according to the true construction of the contract, the plaintiff is entitled to all the rents and profits, and that the judgment in this respect is correct, although in case of need I should gladly hold Mr. Terrell to his offer. [His Lordship then stated the effect of the certificate, the summons to vary, and the order made thereon, and continued :—]

As to the occupation rent, for the reasons assigned by Buckley J., I think the plaintiff's contention is hopeless. But as to the claim for interest there is more difficulty. It was not seriously argued before us that the plaintiff is not liable to pay interest for some period ; and in any point of view I think the plaintiff must pay interest from January 2, 1899, to June 22, 1899, when he first approved a conveyance in what the Court held to be a proper form.

The subsequent period may conveniently be divided into two parts : (*a*) from the writ to the judgment ; (*b*) from the judgment to the present time.

The position of vendor and purchaser under a contract which is silent as to possession and as to interest does not now admit of doubt. From the time when the purchaser could prudently take possession—that is to say, from the time when a good title is first shewn—the parties, in the view of a Court of Equity, change characters. The purchaser becomes the owner of the land, and entitled to the rents and profits and bound to discharge outgoings, and the vendor becomes entitled to the purchase-money, with interest until actual payment, and in respect of this right the vendor has a lien upon the land for his unpaid purchase-money which the Court will enforce. Whether the interest is greater or less than the rents and profits is wholly immaterial. There may, however, be conduct on the part of the vendor, or of the purchaser, which suffices to relieve the purchaser wholly or in part from the liability to pay interest. A familiar example is where the purchaser, complaining of delay, informs the vendor that the purchase-money is lying idle on deposit at a bank, and that he will object to pay anything beyond the bank interest. As it is often difficult to ascertain precisely when this change would take place, it has long been usual to insert express stipulations fixing a date for

completion, without reference to the question whether a good title has then been shewn, as from which date, on the one hand, the purchaser is to be entitled to the rents and profits, and, on the other hand, the vendor is to be entitled to interest. Such a stipulation recognises that, in dealing with land in England, it is the rule, and not the exception, that actual completion does not take place on the day named.

There are two forms, the first of which says that, "if from any cause whatever" the purchase is not completed on the day named, the purchaser shall pay interest at the agreed rate, and the second of which adds the words "other than the wilful default of the vendor." The Courts have so construed the first of these forms as to prevent a vendor from taking advantage of his own wrong: see *Williams* v. *Glenton* (1); *In re Woods and Lewis' Contract* (2), per Lindley M.R.

The second of these forms may be somewhat more extended in its operation in favour of the purchaser, but I do not think the difference is great. If both vendor and purchaser are to blame, the exception of wilful default of the vendor has no operation, and indeed the Court will always struggle to prevent the purchaser from receiving the rents and profits without any correlative liability to pay interest on his purchase-money: see *Birch* v. *Joy*. (3) It is, moreover, well settled that the second form does not apply, even though the purchaser is in no way to blame, if the delay is due to an inability on the part of the vendor to make out a title in due time, or to what has been called by Lord Lindley an "honest mistake" on his part. There are at least three classes of objection or difficulty which may arise in completing a purchase. There are, first, objections to the vendor's title; secondly, objections to the evidence or proof of title; and, thirdly, objections to the form of the conveyance. The distinction between a question of title and a question of conveyance is very refined. The Court, either on a summons under the Vendor and Purchaser Act, or in an action for specific performance, deals with objections of each of these three classes, and as a rule visits the unsuccessful

(1) L. R. 1 Ch. 200. (2) [1898] 2 Ch. 211, 213.
(3) (1852) 3 H. L. C. 565.

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litigant with the costs of the litigation. I am not, however, aware that any such distinction has ever been drawn as that a vendor wrongfully refusing to comply with an objection to title should be deemed not guilty of a wilful default, but would be held guilty of wilful default if the objection were one as to conveyance and not as to title. In either case the vendor may act with perfect honesty and under skilled advice, and I can see no reason why, having regard to the difficulties incident to the law of real property and the practice of conveyancing, such a distinction should be drawn.

Reference has been made to cases—vide *In re Young and Harston's Contract* (1) and *In re Hetling and Merton's Contract* (2)—in which the title has been accepted, the form of conveyance settled, and the conveyance engrossed, but the vendor has not been ready to execute the conveyance, and in such a case the Courts have held that it was wilful default on his part. In those cases all difficulties alike of title and of conveyance had been got rid of, and it was naturally held that the vendor claiming interest would be taking advantage of his own wrong or be guilty of wilful default.

Applying these observations to the facts of the present case, I cannot regard the view taken by the vendors, acting under the advice of counsel, as to the proper form of the conveyance to be other than an honest, though mistaken, view. They were ordered to pay the costs of the action, as they would have been ordered to pay the costs of a summons under the Vendor and Purchaser Act addressed solely to the point whether the conveyance was in proper form. But I cannot hold that there was, within the meaning of the rule, any such wilful default as to exempt the purchaser from liability to pay interest. This covers the period up to the judgment at the trial.

With respect to the period since the judgment, I think there is much less difficulty. It is impossible to say that the delay was due solely to the vendors. The plaintiff denied his liability to pay any interest, and took the judgment in a form which enabled him to raise this point. He also contended that the

(1) 31 Ch. D. 168. (2) [1893] 3 Ch. 269.

defendants ought to be charged with an occupation rent. These two contentions he raised in the proceedings before the master and upon his summons to vary the master's certificate, and he has again raised them in the notice of appeal to this Court. Under these circumstances, I think the plaintiff is liable to pay interest, not merely for the period before action, but also for the whole period from the issue of the writ until the actual completion shall take place. I am aware that the rents and profits are small and the interest is large, but, in my view, the rights of the parties cannot depend upon this.

Buckley J. based his judgment partly on the ground that the delay was not attributable to the alleged wilful default on the part of the vendors, but to the plaintiff's inability to procure the purchase-money. I do not dissent from this view, but I prefer to base my judgment on the ground that there was no wilful default on the part of the vendors.

The result is that, in my opinion, the order of Buckley J. on the summons to vary was correct, and that this appeal ought to be dismissed, with costs.

H. Terrell, K.C., asked for a stay of proceedings pending an appeal by the plaintiff to the House of Lords.

THE COURT granted a stay upon terms.

Solicitors: *Swepstone & Stone; Henry White.*

W. L. C.

C. A.
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March 18, 19.
C. A.
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BELL *v.* MARSH.

[1901 B. 707.]

Estoppel—Representation—Breach of Duty—Solicitor and Client—Purchase of Land by Client—Title investigated and Conveyance prepared by Solicitor—Adverse Title to Part of Land previously acquired by Solicitor.

After having in October, 1893, contracted to purchase a house and land, the plaintiff employed a solicitor to investigate the title and complete the purchase for him. The solicitor on investigation found that a good title was shewn to the whole of the land comprised in the contract, and he prepared a conveyance of it to the plaintiff, and on the execution of the deed the plaintiff paid his purchase-money. The solicitor was the owner of a house and land immediately adjoining that which the plaintiff had purchased, and he had in 1880 in erecting a greenhouse encroached, to the extent of a third of the area of the greenhouse, upon the plaintiff's land. The boundary of the two properties was not very clearly defined, and the solicitor was entirely ignorant of the encroachment. He might, however, have discovered it when he was investigating the title for the plaintiff, if he had measured the property. Early in 1898 the plaintiff discovered that part of the greenhouse was in fact situate on the land which he had purchased, but he said nothing to the solicitor about his discovery. The solicitor died in September, 1899, and in 1901 the plaintiff brought an action against his representatives to recover possession of that part of the site of the greenhouse which was comprised in his conveyance.

At the trial the plaintiff admitted that he was not induced to make the purchase by any representation by the solicitor as to the boundary of the property; that he knew before he entered into the contract that the greenhouse belonged to the solicitor; and that he did not suppose he was purchasing any part of the site of the greenhouse:—

Held, by Buckley J., that the solicitor must be taken to have represented to the plaintiff that he would have a good title to the whole of the land which he had purchased, and that the whole was effectually conveyed to him, and that the plaintiff, having paid his purchase-money on the faith of this representation, the solicitor was estopped, both by representation and breach of duty, from setting up as against the plaintiff his own title by adverse possession to a part of the land, and that the defendants were equally estopped:

Held, by the Court of Appeal, that as the plaintiff was not induced to purchase by any representation made by the solicitor, and did not suppose that he was purchasing any part of the greenhouse, and his position was in no way altered after he had entered into the contract for purchase, a representation (if any) by reason of the solicitor's negligence was not the proximate cause of loss to the plaintiff, and consequently that there was no estoppel.

APPEAL from a decision of Buckley J.

The action was in substance an action of ejectment, and the

question was whether the defendants (who were the executors and trustees of a will) were, by reason of the conduct of their testator, estopped from setting up as against the plaintiff their testator's title by adverse possession to the land in question.

In October, 1893, the plaintiff became the purchaser of a house and land, called Madeira Hall, situate at Ventnor. The property had a short time before been offered by the then owner for sale by auction, but it was not sold. The plaintiff purchased subject to the particulars and conditions which were prepared for the auction. The plaintiff employed Mr. T. H. Urry, a solicitor, to investigate the title and complete the purchase for him. This was done by Urry, and he prepared the conveyance of the property to the plaintiff, who on its execution paid the purchase-money. The conveyance was dated January 26, 1894.

Urry was the owner of a house and land, called Madeira Cliff, which immediately adjoined Madeira Hall on the west. On part of the land, close to the boundary which separated the two properties, Urry had in 1880 erected a greenhouse. This greenhouse was in fact to the extent of about one-third of its area placed upon part of the land which was included in the plaintiff's purchase, though neither the plaintiff nor Urry was at the time of the plaintiff's purchase aware of this fact. The boundary between the two properties was not when Urry built the greenhouse very clearly defined. A few days before the plaintiff made the purchase he went over the property with Urry, who was mentioned in the particulars of sale as a person from whom the particulars and conditions could be obtained, but who did not act as the plaintiff's solicitor until after the purchase had been made. The plaintiff then saw the greenhouse and knew that it belonged to Urry, but neither of them had then any notion that a part of the site of the greenhouse was included in the property which the plaintiff afterwards purchased. If Urry in the course of his investigation of the title and preparation of the conveyance to the plaintiff had tested the measurements of the property as described in the title-deeds and shewn in the plans, he would have discovered that a part of the site of the greenhouse was included in the

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plaintiff's purchase. Urry had, however, been for so many years in possession of the greenhouse that it never occurred to him to take the measurements.

In 1898 the plaintiff discovered for the first time that his conveyance comprised part of the site of the greenhouse, but he did not communicate his discovery to Urry.

Urry died in September, 1899. During the last six months of his life he was in a bad state of health.

In October, 1900, the defendants offered for sale the property called Madeira Cliff. The plaintiff then made known his claim to a part of the site of the greenhouse, and in consequence of this no sale was then effected.

On February 16, 1901, this action was commenced. By it the plaintiff claimed a declaration that the defendants, as personal representatives and trustees of Urry, had not or were not entitled to set up as against the plaintiff any right in or title to any part of the land which was expressed to be conveyed to him by the deed of January 26, 1894, and that the defendants might be ordered to convey and release to the plaintiff free from incumbrances any estate, right, title, interest, or claim which the defendants might have in any part of the land, and to deliver possession to the plaintiff of any part thereof of which the defendants were in possession.

At the trial of the action the plaintiff was examined as a witness. In the course of his cross-examination he was asked the following questions, to which he made the following answers: "When you entered into this contract you did not know the line of boundary between your property and Mr. Urry's property?"—"No. I thought the east end of the greenhouse was the line of demarcation between our two freeholds." "You believed you had bought up to Mr. Urry's greenhouse, but not beyond it?"—"Yes." "Mr. Urry made no representation to you before you entered into the contract as to where the boundary was?"—"No." "You did not enter into the contract on the faith of any representation made to you by Mr. Urry?"—"No." "As to boundaries?"—"No; it was implied." "You did not enter into the contract on the faith of any representation made to you by Mr. Urry as to

boundaries?"—No. As I told you, this house was the line of demarcation according to my idea—this eastern end." "That idea was not formed in your mind on any representation made to you by Mr. Urry?"—"No."

H. Terrell, K.C., and *J. T. Prior*, for the plaintiff.
Astbury, K.C., and *K. G. Metcalfe*, for the defendants.

1902. March 19. BUCKLEY J. (after stating the facts). The defendants claim a piece of ground about one-third of the site of the greenhouse at the eastern end, and a piece of land further to the eastward of the width of some six or eight feet.

All that I have to decide is whether the defendants are right in making that claim. In my opinion, they are wrong. When Mr. Urry, as solicitor for the plaintiff, accepted the responsibility of investigating the title to the property which he had purchased and completing the purchase, and when in performance of that duty he handed him the conveyance of January 26, 1894, it appears to me that he in effect made to his client this representation: "I have as your solicitor investigated for you the title to the land which you have purchased, and I have found that a good title is shewn to the whole of it. I hand you this deed of January 26, 1894, as being an effectual conveyance to you of the whole of that land." I think that by conduct he represented that to the plaintiff. The defendants, Urry's representatives, now seek to say this, "As to that piece of ground it was not the fact that a good title had been shewn to it, because Urry himself was entitled to it by adverse possession. It was not the fact that the deed of January 26, 1894, was an effectual conveyance to you of that piece of land, for Urry himself was entitled to it, and was reserving the right to assert as against you his title by adverse possession." What was Urry's duty as the plaintiff's solicitor? His duty was to see that his client obtained a good title to that piece of ground, and that it was effectually conveyed to him. If he did not do that, he was guilty of a breach of duty.

Two grounds of estoppel therefore arise: estoppel by representation and estoppel by breach of duty. It has been argued

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that, if on January 26, 1894, the plaintiff had known the facts, he would not have got anything more than the defendants say he has got now. It is said that this greenhouse is visible from the Madeira Hall ground, as plainly it is, and the defendants seek to say, "You, the client, must be taken to have known that you were not getting the land up to the boundary line, because you could see for yourself that there was the greenhouse extending beyond that line." I do not quite know how the argument proceeds. It must be put in one of two ways, either that "You knew the greenhouse stood on part of your land," or that "you thought what you were going to get was not the whole of the land, but only the land up to a line drawn differently from the plan on the conveyance, namely, to the eastward of the greenhouse, because, looking at the greenhouse, you must have known that you were not going to get that." I do not think it lies in the mouth of Urry or of those who derive title under him to say either of those things. They could not say that the plaintiff knew that the greenhouse was on the land which, according to the plan, he was going to get, but which in fact he was not going to get, because Urry, if I am right as to the representation which he made by conduct, had represented that the plaintiff was getting the whole of the land according to the plan. If Urry is to be taken to have said that the greenhouse did not stand on the land, he could not say to the plaintiff, "You would have found out that was untrue if you had looked at your deeds to see how it stood"; and if he is to be taken to have said, "You must have understood from the facts, which were apparent to your eyes, that I meant to claim against you part of the land included in the plan, although I was holding out to you that I was not claiming it, because I told you that you would have a good title to the whole," he would equally be precluded from so maintaining. In other words, he could not say to his client, "If you had looked for yourself you would have found that my representations were untrue."

As regards dishonesty of any kind, I acquit Mr. Urry entirely. I do not believe he ever considered where exactly was the boundary of his own land, and really in the particular circum-

stances of this case it did not matter very much to any one where the boundary was, and I do not believe that he knew or thought that the excavations which he had made had gone beyond the proper point. I do not think that in 1894 he was making any fraudulent representation in the sense of wilfully stating anything that was untrue; but of course for estoppel it is not necessary to find fraudulent misrepresentation. You have only to find that a representation was made and acted upon.

In 1894 the plaintiff completed his purchase on the faith of the representation made to him, as I think, by Urry that he had investigated the title to this piece of land, and had found that there was a good title, and that the conveyance was an effectual conveyance to him of the whole of the land which he had purchased. Now Urry, or rather those who derive title under him, seek to set up that that representation was not true.

How do the authorities stand upon this point? I need only refer to two. One is *Savage* v. *Foster*. (1) In that case Margaret Brown was under a settlement tenant for life only of some lands. Her daughter was tenant in tail. The daughter was privy to a conveyance by which Margaret, purporting to be entitled to dispose of the fee, conveyed it to one Williams. The daughter, who was tenant in tail, was not a party to the conveyance, but she was a party to and induced the transaction, and it was held that she, having full notice of the purchase, and having given no notice of her own title to the purchaser, ought not to be at liberty afterwards to impeach his title. The Court in giving judgment said (2): "Now when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser." There the word "fraud" is of course used in the way in which we use it in this Court, and in which

(1) (1722) 9 Mod. 35. (2) 9 Mod. 37.

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I now use it as against Mr. Urry, i.e., not as meaning any act of moral turpitude, but in the sense that he did not when he procured the conveyance to the plaintiff give him notice that he had a title by adverse possession to part of the land. So much for estoppel by negligence.

The other case is *Draper* v. *Borlace* (1), as to estoppel by breach of duty. There a Mr. Hill, "a counsellor of Lincoln's Inn," was entitled to the benefit of a mortgage of the manor of Treludro, and he had a statute of 16,000*l.* penalty as a further security. He was then consulted by a Mr. Ive, in lending of 2000*l.* to Borlace, the mortgagor, on a mortgage of the manor of Gargoll, and acted as counsel for Mr. Ive in the preparation of the mortgage, which contained a covenant that the estate was free from incumbrances, making no mention of the statute. Then "Treludro being supposed to be deficient, the question was, whether Hill should be admitted to take advantage of the statute to lessen Ive's security upon Gargoll." Could he set up as against Gargoll that he had a security by the statute with penalty? The Court said this: "If he who only conceals his incumbrance shall be postponed, much more ought Mr. Hill, who was intrusted as counsel by the mortgagee, and encouraged the lending of the money, and drew the deed with covenant that the estate was free from incumbrances." And it was decreed "that Ive should be satisfied his 2000*l.* out of Gargoll before Hill should charge the same with his statute." To that I will only add a passage as to estoppel by neglect or breach of duty from the speech of Lord Watson in *Scholfield* v. *Earl of Londesborough*. (2) Lord Watson said: "Accordingly, on the supposition already made, if it had been shewn that he had failed to discharge his legal duty to the appellant, the respondent would have been estopped from saying that he did not authorize the fraud committed by Scott Sanders. That estoppel by negligence would, in my opinion, have been sufficient to establish that the respondent had 'authorized' the fraudulent alteration within the meaning of s. 64."

I therefore decide this case upon these two grounds—estoppel

(1) (1699) 2 Vern. 370. (2) [1896] A. C. 514, 543.

by representation and estoppel by breach of duty. I think that the defendants, who derive title under Urry, cannot as against the plaintiff set up that they have, either by way of adverse possession or otherwise, a title to any part of the land which Urry, by the deed of January 26, 1894, represented to the plaintiff that he had procured to be conveyed to him. C. A. 1903 BELL v. MARSH.

The judgment as drawn up contained a declaration that the plaintiff was entitled to the whole of the ground expressed to be conveyed to him by the deed of January 26, 1894, and that the defendants were not entitled to so much of the ground as was claimed by them in the action.

The defendants appealed. The appeal came on for hearing on February 12, 1903. C. A.

Astbury, K.C., and *K. G. Metcalfe*, for the defendants. It is submitted that no representation was made by Urry which can estop him or his representatives from asserting his title by adverse possession. The plaintiff before he made the purchase knew that the greenhouse belonged to Urry, and he did not in making the purchase act upon any representation made to him by Urry. He did not suppose he was purchasing part of the greenhouse, and Urry obtained for him a conveyance of all that which he had contracted to purchase. Estoppel is not a cause of action; it is only a matter of evidence. Estoppel is a purely common law doctrine, and the doctrine of constructive notice has no application to it: *Bloomenthal* v. *Ford*. (1) In order that there may be estoppel, a representation of fact must have been made either by words or by conduct. It must have been an intentional representation with the view of its being acted on, and the person to whom it is made must have believed it and acted upon the faith of it. This is the doctrine of *Pickard* v. *Sears*. (2)

[COLLINS M.R. referred to *Freeman* v. *Cooke*. (3)]

If it is said that an estoppel arises from negligence on Urry's part in not finding out the state of the title as regarded the

(1) [1897] A. C. 156, 167. (2) (1837) 6 Ad. & E. 469; 45 R. R. 538.
(3) (1848) 2 Ex. 654.

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part of the greenhouse, an estoppel by reason of negligence cannot arise if the negligence is not the proximate cause of the injury to the other party. But the plaintiff entered into the covenant for purchase before the relation of solicitor and client existed between Urry and himself. The contract was the proximate cause. Urry was employed only to carry out the contract. Again a representation implied from conduct must have been intended by the man who is said to have made it to bring about the result which is alleged.

[COZENS-HARDY L.J. Must not a man be taken to intend the natural consequence of his conduct?]

Not with reference to estoppel: *De Bussche* v. *Alt.* (1) A man cannot intend that which he does not know.

[ROMER L.J. Can a man be heard to say he did not know that which it was his duty to know? Can a solicitor set up his own negligence and say he did not know that which in that character he ought to have known?]

He could not say that in answer to an action by his client for negligence. But after the statute has run against an action for negligence the solicitor cannot be made responsible indirectly in another way. Urry made no intentional statement to the plaintiff that the property which he had purchased included part of the site of the greenhouse. He was ignorant that it did. The necessary conditions of estoppel are wanting: *Carr* v. *London and North Western Ry. Co.* (2), in which the recognised conditions of an estoppel in pais are stated by Brett J. The rules as to equitable estoppel do not differ from those which govern estoppel at law: *Burrowes* v. *Lock* (3); *Low* v. *Bouverie.* (4) The latter case shews that in order to create an estoppel a statement must be precise and unambiguous. *Savage* v. *Foster* (5) and *Draper* v. *Borlace* (6), the cases upon which Buckley J. relied, depended upon fraud, and they do not really apply to the present case. The conditions of estoppel by negligence are clearly stated by Blackburn J. in

(1) (1878) 8 Ch. D. 286.
(2) (1875) L. R. 10 C. P. 307, 318.
(3) (1805) 10 Ves. 470; 8 R. R. 33, 856; 1 W. & T. 7th ed. pp. 446, 452.
(4) [1891] 3 Ch. 82.
(5) 9 Mod. 35.
(6) 2 Vern. 370.

Swan v. *North British Australasian Co.* (1) The only representation by Urry which can be implied is that there was no flaw in the title to that which they both supposed the plaintiff was buying, i.e., the property excluding the greenhouse, and the plaintiff believed he was getting a conveyance of that which he supposed he had bought. Moreover, there was laches on the part of the plaintiff after he had discovered in 1898 that a part of the site of the greenhouse was comprised in his conveyance. He ought to have communicated this to Urry at once, and he has given no sufficient excuse for his omission to do so. If a man with full knowledge of the facts deliberately abstains from doing anything and meanwhile the position of the other party is materially altered, his conduct will amount to laches, even though the interval of time is but short: *Erlanger* v. *New Sombrero Phosphate Co.* (2) In order to raise an equity by estoppel there must be a misrepresentation of an existing fact, not of mere intention: *Jorden* v. *Money.* (3)

H. Terrell, K.C., and *J. T. Prior*, for the plaintiff. It is submitted that the defendants are estopped by reason of a breach of duty on Urry's part. When a solicitor is instructed by a client to investigate the title to property which he has contracted to purchase, and to complete the purchase on his behalf, and the solicitor does so, and hands over to the client a conveyance of the property with the title-deeds in exchange for the purchase-money, he represents to the client that he has a good title to the whole of the property comprised in the conveyance. Could the solicitor say the next day to the client, "You have no title to the property; I am myself entitled to it"? The solicitor by his conduct represents to the client that the deeds which he hands over to him shew a good title to the property which he has purchased. It is the duty of the solicitor to investigate the title.

[ROMER L.J. Does the solicitor represent anything more than that to the best of his knowledge the title is good—that he has done his best in investigating it? Can it be held that

(1) (1863) 2 H. & C. 175, 182. (2) (1878) 3 App. Cas. 1218, 1279.
(3) (1854) 5 H. L. C. 185.

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he represented that he knew that which he did not in fact know?]

Suppose the solicitor were to prepare the conveyance without looking at the abstract, could he afterwards say to the client, "The title is in me," or, "I have a mortgage on the property," when the mortgage was not disclosed in the abstract? The solicitor must be taken to have known that which it was his duty to know. Can the solicitor be heard to say, "If I had not been negligent of my duty, you would have known the facts"? In *In re Ward* (1) a solicitor was held to be liable for a loss which had occurred by reason of a receiver not having entered into the usual recognizances, the solicitor having, when the receiver was appointed, represented that he had done so. If a solicitor has led his client to believe that he has done his duty, when in fact he has not, he is estopped from averring his own breach of duty.

[COLLINS M.R. The plaintiff did not know that he was buying this piece of land.]

He was entitled to that which he had bought; it does not signify what he thought he was buying. The plaintiff contracted to buy this piece of land, and then he instructed the solicitor to examine into the title and to prepare a proper conveyance. If the title-deeds shew that the title of the vendor is defective, and the solicitor omits to examine them properly, he is guilty of a breach of duty. When the solicitor completes the purchase he in effect represents to the client that he has discharged his duty, and he is estopped from saying that this representation was untrue. He can set up his own title to the property only by averring that his representation was untrue. If a man who has a charge upon property stands by when the owner of the property, subject to the charge, is selling the property as unincumbered, he cannot afterwards set up his charge against the purchaser. A man must be taken to know his own title, and he cannot be heard to say he has forgotten it. The judgment of Parke B. in *Freeman* v. *Cooke* (2) entirely covers the present case. That a man may be estopped by failure to discharge his legal duty is

(1) (1862) 31 Beav. 1 (2) 2 Ex. 662, 663.

shewn by *Scholfield* v. *Earl of Londesborough*. (1) Here Urry's negligence was the proximate cause of the plaintiff's completing his purchase by payment of the purchase-money, and in this way the plaintiff's position was materially altered to his prejudice. Urry represented to him that he had investigated the title, and that the plaintiff would, on paying the purchase-money, get the whole property to which he was entitled under the contract and the conveyance. It was the duty of Urry to tell the plaintiff that he had built his greenhouse in fact upon the plaintiff's land. He ought to have discovered this, and he would have done so if he had measured the property and compared the ground with the plan.

COLLINS M.R. This is really an action of ejectment, though it has taken an equitable colour.

The case raises a very short point, namely, whether the defendants in an ejectment action are estopped by conduct from averring the truth, and the facts lie in a short compass. So far as they are material they are these. The plaintiff contracted to purchase a house and land, called Madeira Hall, at Ventnor. The defendants are the executors of Mr. Urry, the solicitor who acted for the plaintiff after he had made the purchase. Mr. Urry was the owner of adjoining premises, called Madeira Cliff, which consisted in part of a rocky area on which Urry had in 1880 placed a greenhouse. The plaintiff, a day or two before his purchase, went over the ground with Urry. He was aware that Urry was in possession of the greenhouse, but neither Urry nor the plaintiff had any idea that what the plaintiff purchased embraced part of the greenhouse. The plaintiff bought the house and land and employed Urry to act for him in investigating the title and completing the purchase, and the plans and deeds were all submitted to Urry and were approved by him. No doubt the boundary line did in fact take in a part of the greenhouse. There was, however, nothing on the face of the plan to shew this, but Urry might by measurement have ascertained that the boundary line

(1) [1896] A. C. 514, 543.

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embraced a part of the greenhouse. He did not do that. He had been in actual possession of the greenhouse for a period longer than the statutory period of limitation, and there can be no doubt that he was entitled in his own right to the whole site of the greenhouse. He was in full possession, and no one else had any title to it. The plaintiff in his evidence said that he did not intend to buy any part of the greenhouse, and had no reason to suppose he was doing so, and that Urry did not make any representation to him that part of the greenhouse was included in the property which he was about to buy. In that state of things the conveyance to the plaintiff was executed and the purchase completed, and for some years it never occurred to the plaintiff that any part of the greenhouse could under any circumstances be said to be his. But something put him upon inquiry, and early in 1898, more than a year before Urry's death, he discovered that the boundary line did include a part of the greenhouse. No doubt Urry for the last six months of his life was in very delicate health. It is not suggested that he was in delicate health for any longer period; and yet the plaintiff, though he had an opportunity of doing so, did not bring the matter before Urry at all. His excuse as regards the latter part of the time was that Urry was in delicate health. However, other circumstances have since arisen. Urry died in September, 1899, and another gentleman has succeeded him as tenant of Madeira Cliff. Something which he did annoyed the plaintiff, and he then stood upon what he conceived to be his rights, and brought this action.

The only question for our decision is whether the defendants, the executors and trustees of Urry, are estopped from saying, as the fact is, that Urry and his representatives are the owners of the greenhouse, and that no part of it passed to the plaintiff by his conveyance. It is said that Urry's conduct brought him within the law of estoppel, which is part of the law of evidence, and that he was debarred from claiming against the conveyance. In order to do this the plaintiff must make out that the conditions which create an estoppel existed. How does the plaintiff make that out? It must be admitted (for it is the

plaintiff's own evidence) that he was under no impression that he was acquiring any part of the greenhouse, and that he did not find out he had bought it until four years after the conveyance. It seems to me that in order to found an estoppel against Urry the plaintiff must shew that he was led to change his position by representations made for the purpose, or that representations were made by Urry on the faith of which the plaintiff acted. If he cannot do that he cannot succeed. He is entitled to say that the representation was made, not merely by language used, but by conduct, and conduct may include negligence. A man may act so negligently that he must be deemed to have made a representation, which in fact he did not make, but because he has acted negligently he is deemed to have made it. When you test the links in the chain of estoppel in the present case, are they sound? It seems to me that the estoppel breaks down at the most crucial point. The defendants are not debarred from averring the truth unless the plaintiff can shew that he has acted to his own prejudice on the representation, or that he relied upon negligence amounting to representation, and that the representation was the proximate cause of his action. The law on this point is summed up in the judgment of Wilde B. in *Swan* v. *North British Australasian Co.* (1) and in the comments upon it by Blackburn J. in the same case in the Exchequer Chamber (2), which have always been accepted as law ever since. Wilde B. said: "If one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to shew that state of facts did not exist." Blackburn J. said: "This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to

(1) (1862) 7 H. & N. 603, 633. (2) 2 H. & C. 182.

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the party himself, or even of some duty to third persons, with whom those seeking to set up the estoppel are not privy." Testing these links of the chain of estoppel according to that which I have just read, what evidence is there here that the plaintiff was led into the belief so as to act upon it? It must be admitted, as I have already said, that he bought this property without believing that he was acquiring, or intending to acquire, any part of the greenhouse. When he makes that admission he negatives the most crucial fact in the chain of estoppel—he negatives the notion that he has been led to change his position by what is called a representation. The representation alleged is that the property which he was buying embraced part of the greenhouse, and that on the faith of that he bought the property; that he meant to purchase the whole of the property which was conveyed to him, including the part which belonged in fact to Urry. How can he aver that, and say that he was led to act in the belief that he was getting the whole, when at the same time he says that he never intended to get any part of the greenhouse? That, as it seems to me, is a complete answer to the plaintiff's case. It is not a case in which a representation was made that the area of a property was larger than it really was, and afterwards the purchaser had built a house extending up to the margin of the property as it was represented to be: in such a case it would be difficult to say there was not an element of estoppel against the person who had made the representation. But here nothing was done by the plaintiff on the faith of his getting any more land than he supposed he was getting. His rights were ascertained at the time when he made his contract. It was not then intended that he should have any part of the greenhouse, and there has been no change of his position induced by anything which Urry did afterwards.

I am by no means satisfied that the plaintiff has made good his position in the earlier stages of estoppel. He is obliged to rely upon estoppel by negligence. He says that the solicitor ought to have found out by examining the plans and taking the measurements that part of the site of the greenhouse belonged to the plaintiff and was comprised in the

conveyance, and, that not having done so, the solicitor is debarred by his representation and the doctrine of estoppel from averring that that part of the greenhouse is his own. The neglect, if neglect there be, must be in the transaction itself, and must be the proximate cause of leading the other party into the mistake. If that is so, I think that the estoppel breaks down on the facts of the case, because, as I have already said, the negligence was not the proximate cause of leading the plaintiff into the mistake. The negligence of Urry in not finding out the boundary had nothing to do with the plaintiff's buying the property. He bought it not intending to buy or supposing that he was buying any part of the greenhouse, and therefore the negligence, if proved, was not the proximate cause of any loss which he has sustained. I am not sure that Buckley J. fully appreciated the vast importance as regards the doctrine of estoppel of the fact that the person seeking to set it up was induced to change his position on the faith of the representation. I cannot find that he has dealt with that part of the case in his judgment. He has rather assumed that the plaintiff must be taken to have changed his position on the faith of the representation. It is clear, however, that he did not change his position on the faith of any representation made by Urry. I do not think the attention of Buckley J. was sufficiently called to that point, and I am unable to agree with the conclusion at which he has arrived.

For these reasons I think that the decision is wrong, and that the appeal ought to be allowed.

ROMER L.J. I am of the same opinion. I think it is rather important to see what the case set up is not. In the first place, it is not a case of fraud. In the second place, it is not a case in which the defendants are seeking to establish a right because of some defect in the plaintiff's title. The defendants' title depends in no wise upon any defect in the plaintiff's title. The defendants' rights are wholly independent of and outside the plaintiff's rights, and they existed before the plaintiff contracted to purchase the property and before the conveyance to him. It is a case of a very different kind,

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namely, one in which the plaintiff says that the defendants are estopped from setting up the truth of their title—a title altogether outside the plaintiff's title. In other words, it is a case of estoppel against innocent persons depending entirely upon conduct, for actual misrepresentation made by Urry is not alleged. The only estoppel alleged is by the conduct of Urry acting as solicitor for the plaintiff. It is very important to see what the point is to which the estoppel is said to apply. What is the truth which the defendants are seeking to set up, and which the plaintiff says they are estopped from setting up? The truth which the defendants desire to set up is this—that at the date of the conveyance to the plaintiff Urry was in possession of and claimed to be entitled to that part of the greenhouse which is now in dispute. And the plaintiff has to shew an estoppel in respect of that truth. Now, in the first place, did Urry by his conduct as solicitor lead the plaintiff to believe that he (Urry) was not in possession of and had no title to that part of the greenhouse which is in dispute? In the peculiar circumstances of the case I doubt very much whether you could infer from Urry's conduct as solicitor any such representation at all. But I will assume as against Urry that you might infer such a representation by conduct. That, however, is not sufficient for the plaintiff. He must shew that he acted upon that representation—that he was induced by it to believe that the representation was true. Now, did the plaintiff believe that Urry was not in possession of and had no title to that part of the greenhouse now in dispute? To that question of fact there can be but one answer. Clearly the plaintiff believed nothing of the kind. He was not induced to act to his detriment upon any alleged representation made by Urry; and that answers the plaintiff's case, and really solves the problem which arises. That being so, it is of no use for the plaintiff, without singling out any particular representation, to say generally and vaguely, "I did not know exactly what I contracted to buy, but I had a general right to suppose that my solicitor carried out by the conveyance the contract which I had made." The question is not whether the conveyance carries out the contract: as to

that there is no dispute. The plaintiff's own view is that the deed did convey to him in terms exactly that which he had contracted to buy, and he relies upon it in support of his title. The truth is that the question of estoppel is that which I have pointed out, and the plaintiff, failing upon that, fails in the whole of his case. In my opinion, the action ought not to have been brought, and it would have been a pity if the Court had been bound in law to hold that the plaintiff was entitled to succeed.

COZENS-HARDY L.J. I am of the same opinion. If it be material—I do not think it is—to consider the question what was the subject-matter of the contract, as distinct from the conveyance, I am not satisfied that it included any part of the site of the greenhouse. But I will assume in favour of the plaintiff that the opposite view is correct, and that the vendors did contract to sell and the plaintiff did contract to purchase that part of the greenhouse which was in the actual possession of Urry. If the plaintiff had been told by Urry, "Mind, part of the greenhouse, which has been in my occupation for more than twelve years, is not included in your purchase," would he have refused to complete? Had he said "Yes," I should not have been able to believe him. But, so far from that being the case, he said in his evidence, "Mr. Urry made no representation to me as to where the boundary was. I did not enter into the contract on the faith of any representation made to me by Urry as to boundaries. Nothing which Urry did led me to believe that I had purchased part of the greenhouse." In the face of the plaintiff's own statement, that he did not think he was buying any part of the greenhouse, I cannot doubt that there did not exist that which is essential in every case of estoppel, namely, a misrepresentation of a fact relied upon by the other party, and being the proximate cause of leading that party into the mistake.

I assume, without deciding it, that Urry did by his conduct make a misstatement to which the doctrine of estoppel might be applicable. But that is not sufficient for the plaintiff. He

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must shew that the misstatement was the proximate cause of his own action.

For these reasons I think the decision of the learned judge cannot be supported, and the appeal must be allowed.

Solicitors: *Peacock & Goddard, for Urry & Woods, Ventnor. H. Booth Bell.*

W. L. C.

C. A. 1903 *Jan.* 16, 20, 21, 24.

McCONNEL *v.* WRIGHT.

[1901 M. 1384.]

Company — Prospectus — Misrepresentation — Damage — Right of Action — Directors Liability Act, 1890 (53 & 54 *Vict. c.* 64), *s.* 3.

In an action by a shareholder in a limited company against a director for damages for misrepresentations in the prospectus, the time at which the damages ought to be assessed is the date of the allotment to the plaintiff; accordingly, where the plaintiff has applied for and obtained shares upon the faith of a false representation in the prospectus that the company had already acquired a valuable property, the fact that the property is acquired shortly afterwards affords no answer to the plaintiff's claim for damages, unless it be shewn that at the date of allotment the risk that the property would not be acquired was unsubstantial.

In assessing the damages, primâ facie the price paid for the shares is taken to be the exact equivalent of the value of the shares having the advantages represented in the prospectus.

The principle upon which the damages ought to be assessed considered.

THIS was an appeal from a decision of Kekewich J.

The action was brought by a shareholder in the Standard Exploration Company, Limited, against Mr. Whitaker Wright, the chairman of the company, for damages for misrepresentations and the omission of material contracts in the prospectus.

The plaintiff was a cotton-spinner of Preston Park, Manchester, and he had invested in the shares of this company as a speculation.

The company was promoted by the London and Globe Finance Corporation, of which the defendant was the managing director. It was registered on February 11, 1898, with a nominal capital of 1,500,000*l.* divided into shares of 1*l.*

each. The primary object of the company was to acquire for the purposes of amalgamation the interests of several different mining companies which had been started under the same auspices. On May 15 or 16, 1899, the defendant and the other directors of the company issued to the public a prospectus dated May 12, 1899, stating that the London and Globe Corporation were authorized to offer 500,000 shares in the Standard Company for subscription at par. This prospectus contained (inter alia) the following statement:—

"Share Department.—The directors have established a share department for the acquisition and disposition of shares and debentures in approved mines and other undertakings. In furtherance of this object the directors have already acquired large holdings in various promising companies, including the following: British America, Le Roi, Columbia Kootenay, East Le Roi, West Le Roi, London and Globe, Lake View Consols, Ivanhoe, Great Boulder, Associated Kalgurli, Victorian Gold Estates, International Copper, and others. Taken at this day's market quotations these shares already shew a profit more than sufficient to pay a dividend of 10 per cent. on the total capital of this company for the current year."

The prospectus also stated that the company had agreed to acquire the undertakings of various other companies, which were enumerated, including the Austin Friars Syndicate, and that contracts dated May 12, 1899, had been entered into with reference to each of these undertakings, and the prospectus contained a waiver clause as to the contracts therein referred to.

The plaintiff by his statement of claim alleged that the statement headed "Share Department" was untrue, because (1.) the company had not in fact acquired any shares in the companies therein mentioned; (2.) assuming that the company had acquired the shares, they could not be realized so as to produce a profit sufficient to pay a dividend at the rate named, i.e., a dividend of 150,000*l.*; and he also alleged that several other statements in the prospectus were untrue.

The plaintiff also alleged that, contrary to s. 38 of the Companies Act, 1867, the prospectus omitted to disclose certain

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material contracts which he specified, including (inter alia) a contract dated October 27, 1898, made between the London and Globe Finance Corporation and the Standard Company, whereby the corporation agreed to transfer to the company 5000 deferred shares held by the corporation in the Austin Friars Syndicate, and the company agreed to allot to the corporation 40,000 fully paid shares in the company in exchange therefor, and that the 5000 shares in question were practically worthless.

There was another contract, dated May 12, 1899, between the same parties relating to the transfer of the ordinary shares in the Austin Friars Syndicate, and, as above stated, that contract was referred to in the prospectus.

The plaintiff received a copy of this prospectus on May 16 or 17, 1899, and on May 17 he applied for 600 shares in the company. These shares were immediately allotted to him, and he paid 600*l.* in respect thereof.

The company never did any business, and on January 16 1901, an order was made upon a creditor's petition that it should be wound up. There were practically no assets in the winding-up available for the shareholders.

The plaintiff alleged that he had subscribed for the shares on the faith of the prospectus, and that he had suffered damage thereby; but he adduced no evidence specially directed to the question of damage.

The defendant denied the allegations in the statement of claim, and attributed the failure of the company to speculations on the Stock Exchange unconnected with any of the matters referred to in the prospectus.

With reference to the representations in the prospectus under the heading "Share Department," the facts proved were as follows: The statement with regard to the amount of profit was not shewn to be incorrect to any material extent. The bulk of the profit was attributable to 200,000 shares in the London and Globe Corporation, and the balance almost entirely to 200,000 shares in the British America Company. At the date of the prospectus and at the date of the allotment to the plaintiff the Standard Company had not acquired the shares in

the London and Globe Corporation, and there was no agreement binding on the London and Globe Corporation to transfer the shares to the company, although it was intended that the shares should be so transferred. They were in fact transferred to the company on May 27, 1899.

Kekewich J. found that the plaintiff had subscribed for the 600 shares upon the faith of the prospectus as a whole; that several of the representations complained of by the plaintiff, including the statement under the heading "Share Department," were false to the knowledge of the defendant; that the contract of October 27, 1898, was material, and ought to have been disclosed; and that the plaintiff had sufficiently proved damage to justify an inquiry as to damages. He therefore gave judgment for the plaintiff (except upon a side issue not material to be mentioned), and directed an inquiry as to damages in the form in *Arkwright* v. *Newbold*. (1)

The defendant appealed.

Haldane, K.C., *Gore-Browne, K.C.*, and *G. A. Bonner*, for the defendant. This is an action for deceit, and the onus in such an action is on the plaintiff to prove that the statements are not true, and that the defendant knew they were not true. That onus the plaintiff here has failed to discharge. Now damage is of the essence of an action of this kind: *Arkwright* v. *Newbold* (1); and no damage is proved to have been suffered by the plaintiff, for there is no evidence that the Standard shares allotted were less than their par value. This is not like an action for breach of contract, in which the plaintiff is at any rate entitled to nominal damages. In an action based on fraud, if there is fraud without damage, or if there is damage without fraud, the plaintiff has no cause of action. If at the time of the allotment of the shares to the plaintiff they were not of less value than what he gave for them, he has sustained no damage. It is immaterial that the shares afterwards became of less value, unless it can be shewn that this was due to an inherent defect existing at the time of the allotment. The failure of subsequent speculations by the company upon the Stock Exchange (which it was in the

(1) (1881) 17 Ch. D. 301, 311.

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contemplation of all parties that the company should undertake) cannot affect the value of the shares when the plaintiff took them in May, 1899. The subsequent liquidation of the company is not of itself proof of insolvency. The true measure of the damages is shewn by such cases as *Arkwright* v. *Newbold* (1) and *Peek* v. *Derry*. (2)

Warrington, K.C., *Arthur Powell, K.C.*, and *W. Higgins*, for the plaintiff. The non-disclosure of the Austin Friars contract of October 27, 1898, made the whole prospectus fraudulent in the eye of the law. The statement as to the shares in the London and Globe Corporation was clearly untrue, for at the time when the prospectus was issued there was no obligation binding that company to give the shares to the Standard Company. The plaintiff having shewn that a statement in the prospectus was not in fact true, under the Directors Liability Act, 1890, the onus is on the defendant to shew that he had reasonable ground to believe, and did believe, that the statement was true. The true effect of that Act is to restore the decision of the Court of Appeal in *Peek* v. *Derry*. (2) Here there is a material misrepresentation by the defendant acted upon by the plaintiff, and, that being so, the plaintiff shews damage; and the measure of damages is the difference between the amount paid by the plaintiff for his shares and the actual value of the shares at the time of allotment: *Cackett* v. *Keswick*. (3)

[On the question whether the plaintiff relied upon the representations in the prospectus, they cited *Aaron's Reefs, Limited* v. *Twiss*. (4)]

Haldane, K.C., in reply. The remedy given by s. 3 of the Directors Liability Act, 1890, is not coextensive with the common law remedy. The section provides for compensation for loss or damage sustained by reason of the untrue statement; it does not say "by reason of taking shares."

[Collins M.R. It must mean "by reason of being induced to take shares by the untrue statement."]

Assuming the representation as to the London and Globe

(1) 17 Ch. D. 301.
(2) (1887) 37 Ch. D. 541, 591.
(3) [1902] 2 Ch. 456, 468.
(4) [1896] A. C. 273.

shares to be untrue, that representation was made good a few days later, and it cannot be said that the plaintiff has suffered damage thereby. With regard to the contract of October 27, *Sullivan* v. *Mitcalfe* (1) shews that the contract must be material, and, applying the test there laid down, it cannot be suggested that the plaintiff would not have taken the shares if this contract had been disclosed.

Stephen Lynch watched the case on behalf of another director.

Cur. adv. vult.

Jan. 24. Collins M.R., after referring to the constitution and objects of the company, continued as follows:—Kekewich J. has described the transaction which the plaintiff embarked on with his eyes open as a gamble; but he has also come to the conclusion, applying the principle laid down by Lord Halsbury —not for the first time, I think—in *Aaron's Reefs, Limited* v. *Twiss* (2), that, though the plaintiff had very great difficulty in fastening upon any particular misrepresentation which he could aver had influenced him in taking shares, still nevertheless it was a question whether he was misled by the prospectus as a whole, and I think there is quite enough evidence to justify the learned judge in finding as he has found, after seeing the plaintiff in the box, that he was induced to put his money into this concern by representations in the prospectus. The question remains how far those representations were false, and there is a further question whether damage did or did not result, because in an action for fraud, treating this for the moment as an action of fraud at common law, damage is an essential factor in the right of action, and, therefore, misrepresentation without damage is not actionable, neither is damage without misrepresentation. [His Lordship then examined the evidence with reference to the statement as to the acquisition of the London and Globe shares, and came to the conclusion that that statement was false. He then referred to the Directors Liability Act, 1890, s. 3, and continued as follows:—]

By that statute the burden of proving that the defendant did

(1) (1880) 5 C. P. D. 455. (2) [1896] A. C. 273.

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honestly believe and on reasonable grounds that the statement as to the London and Globe shares was true was thrown upon him, because the evidence pointed to the conclusion that those shares had not been acquired at the date of the prospectus. [His Lordship then discussed the defendant's evidence upon this point, and came to the conclusion that he had not discharged the onus which was cast upon him by the statute. He then dealt with the charge based upon s. 38 of the Companies Act, 1867, and agreed with the learned judge that that charge was well founded. He then discussed certain other alleged misrepresentations in the prospectus, and as to them he disagreed with the findings of the learned judge, being of opinion that the plaintiff had not established that the statements in question were false; and he continued as follows:—]

Therefore, it comes to this—that the one central misrepresentation is that contained in the paragraph as to the share department. There is also the misrepresentation resting upon the statutory provision of s. 38 of the Companies Act, 1867. But still the plaintiff, having established misrepresentation, has to shew damage; and, therefore, I have to go next to the question of whether or not he has shewn that he has sustained substantial damage in this case. It was contended very forcibly by the defendant that this is a case in which no substantial damage has been established, because, even conceding that there was any misrepresentation upon which the plaintiff acted, still all such representations were made good within a week or ten days after the issuing of the prospectus; and, therefore, a man who embarked in a company, which in point of fact at the time of the action did contain all that he had reason to suppose it would contain in the way of property, could not come here and claim damages on the footing that he had lost his money. Of course that raises a very important question. The learned judge has found that there was substantial damage, and, if there was evidence upon which he reasonably might find it, we should be very reluctant to differ from him. The question, therefore, is whether, in the circumstances proved as to this company at the trial, there was

sufficient evidence of substantial damage to justify the learned judge in coming to his conclusion. In my opinion there was. It was proved that this company went into liquidation, and was wound up on January 16, 1901, and practically nothing comes to the plaintiff in the winding-up. It was suggested in evidence by Mr. Whitaker Wright that the complete failure of the company and the absence of all assets were due to transactions entirely disconnected with any of the misrepresentations in the case; but it is clear that the learned judge did not give implicit credit to Mr. Whitaker Wright's evidence, and, therefore, it cannot be treated as established that no part of the complete financial failure of the company was due to any of the matters misrepresented in the prospectus. But apart from that it seems to me that there was evidence of substantial damage sufficient to support the action upon this point, which I have called the central point of misrepresentation, as to the acquisition of these shares and the profits thereon. Now as to that profit which Mr. Whitaker Wright claimed to have established, on the evidence as it now stands and the result of the learned judge's decision, it was not at all certain, at the time when the prospectus was issued, whether the Globe shares would be acquired or not. In point of fact they were not acquired till some time later, and therefore at the date when the prospectus was issued there was a misrepresentation, and damages might have been assessed there and then on the date on which this gentleman paid his money on the allotment of shares to him. That is clearly the time at which his damages must be assessed. He had paid his money, and he had got in return for it a property which did not contain the 200,000 Globe shares, in respect of which a profit of so large an amount is said to have been obtained. Therefore the position is this, and anybody assessing the damages will have to consider it: What is the difference between the value of the property as it was represented and the property without this large asset in it, having regard to the possibility, certainty, or uncertainty of that asset ever being in fact acquired? We now know, no doubt, that it was acquired afterwards; but that is not the material point. The damages have to be

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ascertained in view of the facts as they were at the time—in view of the central fact that this asset had not been acquired. Whether it could be legally acquired at all might be a question. One would have to consider whether the handing over of such shares from the Globe Corporation by the managing director, Mr. Whitaker Wright, to another company, with this profit upon them, at a consideration of not the then apparent value of them, but the face value of them, was a transaction that could have been enforced or not; and whether, even if it could be enforced, the Globe Corporation had so committed themselves to it as to make it capable of being enforced against them at all; and, thirdly, whether, if they were not absolutely legally fixed with the obligation of carrying it out, they would in point of fact carry it out. All these questions would have to come into consideration, and this might result in a conclusion that it was a matter of so much uncertainty whether these shares would be acquired that the omission to acquire them might be treated as an absolute loss to the assets of the company at the time. At all events, it seems to me that there was abundant evidence that the difference between the position of the company with those shares and its position with such prospects as it then had of acquiring them afterwards might be substantial.

That obliges me to say something as to the principle upon which damages are assessed in these cases. There is no doubt about it now. It has been laid down by several judges, and particularly by Cotton L.J. in *Peek* v. *Derry* (1); but the common sense and principle of the thing is this. It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect come in, but it is an action of tort—it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, primâ facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his

(1) 37 Ch. D. 541.

loss. But, in so far as he has got an equivalent for that money, that loss is diminished; and I think, in assessing the damages, primâ facie the assets as represented are taken to be an equivalent and no more for the money which was paid. So far as the assets are an equivalent, he is not damaged; so far as they fall short of being an equivalent, in that proportion he is damaged. Here there is strong evidence, which the judge has acted on, that there has been a substantial diminution in the equivalent, and, therefore, that the plaintiff has sustained substantial damage.

Now these things, taken together, fulfil all the conditions of the action. There must be damage suffered by reason of action taken upon misrepresentation. All these conditions are fulfilled; and therefore, as it seems to me, this judgment must be affirmed, though, as I have pointed out, I do not agree with the learned judge in all his findings of fact. Still, in the result of his decision we agree, and this appeal, therefore, must be dismissed.

Romer L.J. I also think that this appeal must be dismissed. I will for brevity refer to the London and Globe Finance Corporation, Limited, as the Globe, and to the Standard Exploration Company, Limited, as the Standard. Now it appears to me that there was undoubtedly one statement of a substantial kind in the prospectus issued by the defendant which has been shewn to be untrue. I refer to the statement in the prospectus under the head of "Share Department." That allegation in the prospectus was clearly of a substantial kind, and one which, on the evidence, I come to the conclusion was relied upon by the plaintiff. Under the Directors Liability Act, 1890, s. 3, if the defendant wished to escape liability for that untrue statement, he would have to prove that he had reasonable ground to believe, and did up to the time of the allotment believe, that the statement was true. That onus being on the defendant, he has failed to discharge it.

Now the plaintiff, as I have pointed out, took the shares in the Standard on the faith and because of that untrue statement—

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on the faith of the statement being true. If that act of taking shares caused loss or damage to the plaintiff, then in the words of the section, in my opinion, the defendant is bound to pay compensation for that loss or damage.

The question then is, Did the plaintiff suffer loss or damage because he took these shares in this company by relying upon this statement in the prospectus? In other words, Did he suffer loss or damage because he took these shares? The question comes to this, having regard to the inquiry directed by the judge, Did the plaintiff at the trial of this action sufficiently shew some substantial damage in respect of his taking these shares so as to justify the inquiry directed by the Court? On the whole I think he did. That he had in fact suffered loss or damage at the time he commenced his action is beyond question, in this sense, that the company has been wound up and he has lost his money. But the defendant says by his evidence that the winding-up of the company and the loss which thereby ensued were due, not to circumstances existing at the date of the allotment of the shares, but solely to circumstances which occurred afterwards—for example, certain speculations in shares. [His Lordship said that in this particular the evidence of the defendant was not corroborated, and that he could not accept it as conclusive, and he continued as follows:—]

But even assuming in the defendant's favour the point which he was making by his evidence, and taking it in his favour that the plaintiff has to shew from other circumstances beyond the winding-up of the company and the loss that thereby ensued that the shares at the date of allotment were not worth what he gave for them, I think upon the whole that the plaintiff has sufficiently shewn this. I apprehend that when in a case like this application is made for shares in a company on a representation stating what advantages that company has, in the absence of evidence to the contrary, it should be taken that the price paid for the shares was equivalent to the value of the shares in the company having the advantages stated in the prospectus. Certainly as against the plaintiff, although I will assume as against him for this

purpose that the money he paid for these shares was met by an equivalent if he had received shares in a company having all the advantages stated in the prospectus, I cannot assume, in the absence of evidence to the contrary, that those shares were worth more than what he paid for them. The question then comes, Was there any evidence which would shew that at the date of the allotment these shares had, by reason of other advantages beyond those shewn in the prospectus, a greater value than the sum which the plaintiff paid for them? I think not. In the circumstances of this case I certainly cannot take the market quotations with regard to these shares for some time after the allotment, as shewing that the shares had a true value above what was given for them, apart from the representations contained in the prospectus. Nor was there any evidence to shew that, apart from the deficiency of assets which would be shewn in this company, if the statement as to the 150,000*l.* profit was untrue, it was made good by other advantages of the company not shewn by the prospectus or existing in fact. Therefore, if the 150,000*l.* assets in fact did not exist at the date of this allotment, I take it that at that date the company's shares were not worth what was given for them, because the company had not the 150,000*l.* assets which the prospectus said it had. Now, how do the defendant's counsel seek to meet that? They say, True, the company had not these shares at the date of the allotment, but it acquired them a few days afterwards, and they ask the Court to say that that made good the representation. I need scarcely point out the fallacy of that contention. Unless they can establish that the risk which was run by this company, which had not got the shares at the date of allotment, and might never have got them, was unsubstantial, in my opinion that risk was not unsubstantial. The question has to be tried by looking at what was the true value of the shares, of course, at the date of allotment. To shew what was the value of the shares later on, after the company had got these 200,000 Globe shares, is not to the point, nor indeed is it relevant to inquire, because if one went on to inquire what was the condition of the shares some days later, when the 200,000 Globe shares

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were acquired, one ought also to inquire what were the other circumstances of the company at that time; for it would not follow of necessity that there were no other counterbalancing disadvantages at that later date. It must be pointed out that it is irrelevant to inquire into a state of circumstances after the date of allotment—that is to say, to inquire only as to one particular side of the matter. The proper inquiry is, What was the true value of these shares at the date of allotment? As I have pointed out, if the risk run was substantial, as I have said I think it was, then the shares were not worth what they were represented to be worth by the prospectus, which was the price paid for them by the plaintiff. I think, therefore, that the plaintiff has given sufficient evidence of damage to justify the Court in directing the inquiry as to damages which has been directed.

Cozens-Hardy L.J. In this action the plaintiff claims damages against the defendant by reason of statements and omissions in the prospectus of the Standard Exploration Company, Limited, on the faith of which prospectus the plaintiff applied for 600 shares, which were allotted to him. The defendant was a director of the Standard Company, and was responsible for the issue of the prospectus. The action is not launched as a common law action of deceit, in which fraud would have to be alleged and proved, although it may be that the facts proved here would support such an action. It is really based upon the Directors Liability Act, 1890, and upon s. 38 of the Companies Act, 1867.

Now the Directors Liability Act was passed in 1890, the year after *Derry* v. *Peek* (1) had been decided in the House of Lords, and, as it seems to me, for the express purpose of getting rid of the effect of that decision, so far and so far only as directors and promoters issuing a prospectus on the one hand, and persons taking shares and debentures on the other hand, are concerned. In that particular case the plaintiff has only to prove, in addition to damage, that a material statement of fact is untrue, and he can maintain an action, unless the defendant can establish that he had reasonable ground to

(1) (1889) 14 App. Cas. 337.

believe, and did believe, the statement to be true. In other words, the onus of proof is shifted.

[His Lordship then discussed the evidence, and came to the conclusion that the statement as to the Globe shares was untrue, and that the defendant had not discharged the onus which rested upon him of establishing that he had reasonable ground to believe, and did believe, the statement to be true; and that that statement was material; and he continued as follows:—]

As to damage, it seems to me that the loss of the London and Globe shares, which were stated to be worth more than 75,000*l.* beyond the par value, is primâ facie evidence of damage. As a rule of convenience, and indeed almost of necessity, the property which would have been acquired by the company, if all the statements in the prospectus had been correct, must primâ facie be taken to be worth the precise sum paid for the property, neither more nor less. This is the primâ facie presumption, and it is sufficient for the decision of the present case, for no evidence has been adduced by the defendant to rebut the presumption. The learned judge was therefore right in holding that the plaintiff had proved damage, though the precise amount was not gone into at the trial. The inquiry as to damages is correct in form. It is not to the point, it seems to me, to allege that shortly afterwards the Globe shares were allotted. Subsequent events cannot be looked at for this purpose. There was a material risk at the date when the plaintiff acquired his shares that the statement would not be made good. I am not prepared to assume in favour of Mr. Whitaker Wright that he would make an allotment which would be a breach of his duty as director of the London and Globe.

[His Lordship also agreed with the learned judge as to the omission from the prospectus of any reference to the contract of October 27, 1898. He was therefore of opinion that the appeal should be dismissed.]

Solicitors: *Burn & Berridge; Lesser & Danger; Gilbert Robins.*

H. B. H.

C. A.
1903
Feb. 25.

In re BLAGRAVE'S SETTLED ESTATES.

[1900 B. 615.]

Settled Land—Tenant for Life and Remainderman—Capital Money—Additions and Alterations with a view to Letting—Electric Lighting Installation—Engine-house—Settled Land Acts, 1882 (45 & 46 *Vict. c.* 38), *s.* 25; 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s. ii.*

The word "additions" in s. 13, sub-s. ii., of the Settled Land Act, 1890, means structural additions; and, therefore, an electric lighting installation for the improvement of the mansion-house is not an "addition" to buildings within the meaning of that sub-section.

In re Clarke's Settlement, [1902] 2 Ch. 327, and *In re Gaskell's Settled Estates*, [1894] 1 Ch. 485, approved.

Semble, per Romer and Cozens-Hardy L.JJ. An engine-house for electric lighting apparatus, erected some little distance from the mansion-house, is not an "addition" or "alteration" within the meaning of this sub-section.

Appeal from an order of Joyce J.

This was a summons under the Settled Land Acts, 1882 to 1890, taken out by a tenant for life, asking to be allowed, out of capital moneys in the hands of the trustees of the settlement, certain expenses incurred by him in repairs and improvements to the mansion-house with a view to letting it: the only item in this expenditure which calls for any report was a sum of 1074*l.*, the cost of providing an electric lighting installation. It appeared from the evidence that a sum of 232*l.* had been spent in the erection of an engine-house and accumulator room at some little distance from the mansion-house, and a further sum of 1074*l.* had also been spent by the tenant for life for the cost of supplying a petroleum engine, dynamo, switchboards and cables, fixing the same, and completing the installation.

By an order of July 30, 1902, Joyce J. had allowed the sum of 227*l.* for the engine-house and accumulator room, but, following the decision of *In re Clarke's Settlement* (1), had disallowed the whole of the 1074*l.* for the engine and accessories

(1) [1902] 2 Ch. 327.

necessary to complete the installation : from the latter part of this order the tenant for life appealed.

Dibdin, K.C., and *Errington*, for the appellant. The expense of the engine-house has already been allowed : the engine-house is of no use without the engine and fittings. What the tenant for life now asks for are only accessories to what has been already allowed. Without the necessary plant the tenant for life gets no benefit from the engine-house ; and under s. 25 of the Act of 1882 he is entitled to the full benefit of the works authorized. Electric plant is "an addition" to the building reasonably necessary to enable the mansion-house to be let within the meaning of s. 13, sub-s. ii., of the Settled Land Act, 1890 ; and, as a fact, the mansion has been let in consequence of this addition. *In re Freake's Settlement* (1) is correct on this point. In *In re Clarke's Settlement* (2) the word "structural" is wrongly read into the section, adopting on this point the decision in *In re Gaskell's Settled Estates.* (3) The word "structural" is not in the section. Why should the Court go out of its way to read in a word which may prevent tenants for life from making most necessary additions to the mansion-house ?

Garnett, for the trustees, was not called on.

COLLINS M.R. This is an appeal from a decision of Joyce J. It virtually, although Mr. Dibdin does not admit it, is an appeal from a decision of Buckley J. in the case of *In re Clarke's Settlement* (2), and the question is whether a tenant for life is entitled, out of the capital moneys, to have paid for him the expense of an electric installation. His rights depend upon the Settled Land Acts ; and, if he has them, they are, as admitted by Mr. Dibdin, to be found only in s. 13, sub-s. ii., of the Act of 1890, coupled with s. 25 of the principal Act of 1882. The words of sub-s. ii. of s. 13 of the Act of 1890, which come under the head of "Improvements," are these : "Making any additions to or alterations in buildings reasonably necessary or

(1) [1902] 1 Ch. 97. (2) [1902] 2 Ch. 327.
(3) [1894] 1 Ch. 485.

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proper to enable the same to be let." That is the provision in s. 13. That is supplemented by the last words of s. 25 of the principal Act of 1882 which are: "necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes, namely," those mentioned in the subsequent sub-sections of the Act. Mr. Dibdin's first argument is this. He says, I have obtained from the learned judge the right to have built out of capital money a house for containing electric plant. Then he says, Now that I have got that house, I am entitled to say I cannot secure the full benefit of that house unless you allow me to put electric plant into it. In other words, he says that the electric plant (and he does not limit the amount for the purpose of the argument), not only for generating electricity, but also all that is necessary for the installation—that is to say, the wires, apart from the ornamental fittings—are accessories to the engine-house! That seems to be rather an inversion on the part of the appellant—that, having got leave to build the engine-house at a comparatively trifling cost, he is therefore entitled at the expense of the capital to a much larger amount to acquire the plant for an electric installation in the mansion-house. That argument cannot, in my opinion, be supported. If he has any case, it must be on the main argument that the electric plant is an addition to the building under the words of the Act which I have read. It really comes to this: Is electric plant an addition to a building within the meaning of that section? Buckley J. has decided that it is not. Joyce J., in an earlier case of *In re Freake's Settlement* (1), without giving any reasons, allowed the expenditure out of capital for this purpose; but in this, a subsequent case, having Buckley J.'s decision before him in *In re Clarke's Settlement* (2), he elected to follow Buckley J.; so that, so far as the Courts below go, there is a decision of two judges that the addition of electric plant is not "an addition" to the building. For my own part, I have great difficulty in differing from Buckley J.'s view, which was based, not merely upon his own opinion, but upon an earlier decision of Chitty J. in *In re Gaskell's Settled Estates* (3),

(1) [1902] 1 Ch. 97. (2) [1902] 2 Ch. 327. (3) [1894] 1 Ch. 485.

where, although the words "structural addition" are not used, the learned judge seems to have considered that an addition to a building must be, in its terms, something in the nature of a structural addition. This view Buckley J. adopted, although he says, perfectly truly, that the word "structural" is not used in the Act, and that the word "addition" is capable of a good many meanings; but when you have an addition to a building, it is difficult to imagine what addition there can be within this Act which does not involve a structural addition. Mr. Dibdin does not, and cannot, contend that something added to the building which is not attached to it, such as furniture and loose chattels, can be said to be an addition to the building. But why not, if his main argument is correct? The plant is not any more than the furniture an addition of like to like, but is merely something that adds to the amenities of the building. Into what categories are you to divide the additions? You can only get three gradations—namely, loose chattels which are not attached at all, fixtures which are attached in a certain sense, and actual structural additions. Which of those is meant? It seems to me that it would be very difficult to divide off any possible alternative short of an actual structural addition. Primâ facie it seems to me that the addition meant by the section is a structural addition to the building, and that it is not satisfied by putting wires into a building or putting an engine into an engine-house. Those do not seem to me to come within the sort of addition that is meant in this Act. I agree entirely with the observations of Buckley J. in *In re Clarke's Settlement* (1) as to electric plant, and of Chitty J. in *In re Gaskell's Settled Estates* (2) as to hot water and heating apparatus. They completely cover this case, as it seems to me, and therefore this appeal fails.

ROMER L.J. I also agree with the reasoning and the decision of Chitty J. in *In re Gaskell's Settled Estates* (2), and of Buckley J. in *In re Clarke's Settlement* (1), and I think the principle of the decisions in those cases governs the present. The appellants are obliged to admit there is nothing in the

(1) [1902] 2 Ch. 327. (2) [1894] 1 Ch. 485.

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Settled Land Acts which deals specifically with lighting, either by electricity or by gas, and they are obliged to try to bring the installation of the electric lighting within s. 13, sub-s. ii., of the Act of 1890. Now as to that, it certainly appears to me that when the Legislature in that sub-section speaks of an addition to, or alteration in, buildings, it is speaking of something which is in itself of the nature of a building. That being so, it appears to me clearly in the present case that even if the building itself, the dynamo-house, which may be described as additional, the cost of which has been allowed by the Court below, comes within the sub-section, it cannot be said that the installation for the electric lighting also falls within the sub-section. I am bound to say that I do not quite see how the learned judge in the Court below came to allow the expense of the erection of the dynamo-house, seeing, as far as I am aware, that that house was some distance from the mansion-house. It is difficult to see at first sight how it could be said to be an addition to, or alteration in, the mansion-house, or any previously existing buildings; but that point is, fortunately, not before us.

COZENS-HARDY L.J. I entirely agree. Like Romer L.J., I at present entertain great doubt whether the expenditure of capital money in the construction of the dynamo-house, situate as I understand it is, can be brought within any head of the Settled Land Act. Sect. 13, sub-s. ii., certainly does not mean making any additional building on an estate, but it is an addition to, or alteration in, existing buildings. However that may be, I think it is impossible to escape from the cogency of the reasoning of Buckley J. in the case of *In re Clarke's Settlement*. (1) It may well be that it might be desirable to extend sub-s. xiii. of s. 25 of the Act of 1882, so as to authorize the provision of electric light or gas, whether for lighting or for power, on the same footing as water supply; but that is a matter for the Legislature, and not for us. We have in the Settled Land Act a code which is exhaustive and complete; and it is idle simply to argue that an improvement will be

(1) [1902] 2 Ch. 327.

beneficial unless, in the first instance, you can bring it within one or more of the sub-sections of this Act. I think, therefore, the decision of the learned judge is quite right.

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Solicitors: *Bridges, Sawtell & Co.*

W. C. D.

C. A. 1903 *Feb.* 25.

In re APPLEBY.

WALKER *v.* LEVER.

[1900 A. 246.]

WALKER *v.* NISBET.

[1902 A. 269.]

Will—Remoteness—Invalid Trust for Sale of Realty—Validity of Gift—Conversion—Share of Proceeds, whether Real or Personal Estate.

A testator who died in 1854 devised his real estate, in certain events, upon trust for sale, and gave the proceeds of sale among classes of persons who were all ascertainable without infringing the rule against perpetuity. The trust for sale was admitted to be bad as not being limited to take effect within the prescribed period; the will contained no direct gift of the income of the property until sale in favour of the persons entitled to the proceeds of sale if the trust for sale had been good:—

Held, affirming the decision of Byrne J., that, as the persons who were intended by the testator to take the beneficial interest in his property were persons who could be ascertained within the rule against perpetuities, the gift to them was good; that though the trust for sale was bad, it was mere machinery for the purposes of division, and could be disregarded, and that the beneficiaries took the property as real estate.

Dictum of Stirling J. in *Goodier* v. *Edmunds*, [1893] 3 Ch. 455, adopted.

In re Daveron, [1893] 3 Ch. 421, approved.

APPEAL from a decision of Byrne J.

This was the further consideration of a summons for the administration of the estate of the above-mentioned Robert Appleby, and the hearing of an originating summons relating to the same estate, which were both heard together, and raised several questions as to the administration of his estate and the construction of his will. The first question argued was

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whether a trustee who had paid the whole of the income arising from investments made, not by the testator, but by the trustees, and not authorized by the terms of the will, to a tenant for life, could be called upon to repay to the estate, though no loss had been thereby occasioned to the capital, so much of the income as exceeded the amount which would have arisen if the fund had been properly invested in authorized securities; and on this Byrne J., on June 24, 1902, held, on the authority of *Stroud* v. *Gwyer* (1), which he considered indistinguishable from the present case, and notwithstanding *In re Hill* (2), that the trustee was not liable to repay, or account for, any excess of income so paid.

Another question, and the only one requiring any detailed report, was raised by the second summons, which asked for a declaration that all the limitations in the will of the testator's residuary real and personal estate were void for remoteness.

The provisions of the will were somewhat elaborate, the classes of beneficiaries being very numerous; but as the case is reported not so much as one on the construction of the language of this particular document, as for the sake of the observations of the Master of the Rolls and Lords Justices on the authorities which Byrne J. considered binding on him and upon *In re Daveron* (3), the following short statement of the effect of the testator's limitations is sufficient to make the report intelligible.

The testator, who died in 1854, gave his residuary personal estate (other than leaseholds) to trustees upon trust for conversion and investment, and then devised and bequeathed to his said trustees all his real and leasehold estates, and declared that they should stand possessed thereof, and also of his residuary personal estate when invested upon trust, in the events which happened, to pay the rents and profits and annual income thereof to his daughter Ann Skinner, the wife of J. H. Skinner, during her life, and after her death, in case she should leave the said J. H. Skinner or any future husband surviving her, to pay the said rents and profits and annual

(1) (1860) 28 Beav. 130. (2) (1881) 50 L. J. (Ch.) 551.
(3) [1893] 3 Ch. 421.

income to the said J. H. Skinner or such future husband during his life; and subject thereto the real and residuary personal estate was to be held upon trust for the children of Ann Skinner. And in default of children who attained twenty-one or married (which happened), then the testator directed that his said trustees should, after the decease of the said Ann Skinner and any husband of hers and such failure of children as aforesaid, sell his real and leasehold estates and hold the net proceeds thereof, and also his residuary personal estate, upon trust for certain persons, or classes of persons, therein mentioned, absolutely in fifths, these classes being mostly children of maternal uncles and aunts of his said daughter. The will contained no express gift of the income of the property until sale in favour of the beneficiaries to whom the proceeds of sale were given, but it did contain the following maintenance clause: "And in case any child or children of my said daughter, or any child or children of her aunts or uncles hereinbefore named, shall for the time being under the trusts aforesaid or any of them be entitled presumptively, but not absolutely, to any share or shares of the aforesaid trust premises, then I direct that my said trustees shall in the meantime (subject and without prejudice to the life interests hereinbefore respectively given to my said daughter, and any husband who may survive her) pay or apply the annual income of the presumptive share for the time being of each such child in the said trust premises (including such, if any, of the said real and leasehold estates as shall for the time being remain unsold)," or so much thereof as his said trustees should think proper for the maintenance and education of such child.

Ann Skinner died in 1882 without issue; and her husband, J. H. Skinner, died in 1899.

It was admitted that the trust for sale was bad, as being limited to take effect after the death of a possible future husband of Ann Skinner, who might not have been born at the testator's death; and it was also admitted that the various classes of persons who were to take the proceeds of sale were

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all ascertained or ascertainable within the prescribed period; and the question for decision was whether under these circumstances these beneficiaries could take the property as realty, or whether there was an intestacy and it passed to the heir-at-law.

Byrne J. on July 1, 1902, following the dictum of Stirling J. in *Goodier* v. *Edmunds* (1), held that the trust for sale was mere machinery for the purpose of division, and that the equitable interests went to the persons who would have taken had the trust for sale been good, and subject to this, that the property passed as real estate, there being no effectual trust for sale.

The representative of the heir-at-law appealed.

Mulligan, K.C., and *Waley*, for the appellant. The will must be read as at the death of the testator, and possible, not actual, events must be regarded; the trust for sale is admittedly too remote, and the gift of the proceeds of sale is open to the same objection: it is contingent on the testator's daughter having no child, and on the numerous beneficiaries signifying their intention to take the gift as real estate. In view of the impossibility of a sale, there must be an election in fact to take the property as realty, and this the beneficiaries might not do until after the limit allowed by law. Hence the interest of the beneficiaries was not one which necessarily arose within the time limited by the rule against perpetuities: *London and South Western Ry. Co.* v. *Gomm.* (2)

The trusts of the will in *Goodier* v. *Johnson* (3) were different from the trusts in the present will. In *Goodier* v. *Johnson* (3) an equitable estate in fee was vested in the beneficiaries until sale, and there was a gift to them of the intermediate income. *Goodier* v. *Edmunds* (1), a decision on the same will, only decided that the beneficiaries took their shares as real estate; the part of the case relied on by Byrne J. was only a dictum, not a decision. *In re Daveron* (4) was decided on the doctrine

(1) [1893] 3 Ch. 455.
(2) (1882) 20 Ch. D. 562.
(3) (1881) 18 Ch. D. 441.
(4) [1893] 3 Ch. 421.

of election. The Court will not aid an attempt to create a trust in violation of the perpetuity rule, either by the application of the doctrine of election or otherwise: *Wollaston* v. *King*. (1)

[ROMER L.J. Suppose the will contained words to the effect that the beneficiaries might, if they so desired, take the real estate as realty instead of taking the proceeds of sale?]

That would be in favour of the appellant, because, until all the beneficiaries intimated their desire to the trustees, there could be no election: that intimation might not be given until after the death of a possible future husband of Ann Skinner—an event which would be too remote within *London and South Western Ry. Co.* v. *Gomm*. (2)

[COZENS-HARDY L.J. Surely the maintenance clause shews an intention to give the beneficiaries an interest in the real estate?]

No; the beneficiaries are only to have the rents contingently and during minority, and that is not sufficient: *Lord Dungannon* v. *Smith*. (3) For these reasons we submit there is an intestacy as to the real estate which passes to the heir-at-law.

Rowden, K.C., and *R. Hughes; Levett, K.C.*, and *Potts; Younger, K.C.*, and *MacSwinney; Norton, K.C.*, and *C. W. Turner; Carson, K.C.*, and *Beddall; Douglas;* and *E. P. Hewitt*, for the respondents, the various classes of beneficiaries, were not called on.

COLLINS M.R. The testator in this case directed that the rents and profits of his real estate—the only question argued arises on the real estate—should be received by certain persons in succession, his daughter or any husband or future husband of hers—I leave out the intermediate dispositions, which are not material; and on the death of the survivor there was to be a sale, and certain persons were named, or rather certain classes were named, who were to take the proceeds of sale. Now it turns out that the sale itself being, according to his disposition, one that might take place beyond the limited period, on the question of perpetuity, the trust for sale was undoubtedly bad;

(1) (1869) L. R. 8 Eq. 165. (2) 20 Ch. D. 562.
(3) (1846) 12 Cl. & F. 546.

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and the question is what are the rights of the parties in view of that fact.

Byrne J. has held that inasmuch as on the face of this will there is clear indication that a certain class, ascertainable and ascertained within the proper period, was intended by the testator to receive the rents and profits until the sale, and intended to have the proceeds after the sale, that was a clear indication on the part of the testator of an intention to dispose of the property to those persons, and that the sale, if it has become impossible, as the parties say it has, was a mere piece of machinery; and that striking it out of the will does not affect the other rights of the parties in accordance with the intention of the testator. This decision is contested here by Mr. Mulligan, who says that there must be an election on the part of those beneficiaries, in view of the impossibility of sale, to take the property in the form of realty as it was, irrespective of sale; and he says you cannot get that election, or give effect to it, unless you can get the election in fact. That really appears to me to be the only point that he makes upon the case.

It seems to me that the case is concluded by authority. We have the decision of the late Master of the Rolls, Sir George Jessel, in *Goodier* v. *Johnson* (1), and we have the dictum of Stirling J. in another case upon the same will in *Goodier* v. *Edmunds* (2); and in the same volume as Stirling J.'s judgment we have the decision of Chitty J. in *In re Daveron* (3), which is more directly, in fact is directly, in point, and a decision on a matter upon which Stirling J. only gave an opinion, but did not decide it. Chitty J. says this in the case of *In re Daveron* (4): "The will contains a general devise to the use of trustees which carried the reversion in fee; and the trusts which he declared are, to pay this ground rent of 70*l.*, so long as the lease shall run, in certain proportions and to certain persons. I need not go through that part of the will because there is no question in regard to the validity of this trust, as declared. . . . Now comes the question whether I can give effect

(1) 18 Ch. D. 441.
(2) [1893] 3 Ch. 455.
(3) [1893] 3 Ch. 421.
(4) Ibid. 424.

to the testator's intention, seeing that he has directed a sale and his directions as to the sale are invalid. It is plain that the trust to sell and pay the proceeds to A. (a named person) confers an equity on A., and gives him the whole beneficial title which the testator is entitled to in fee simple. In equity A. is the beneficial owner, and A. can come to the trustees and say, 'I desire you not to sell, but to convey the estate to me.' About that there is no question. It is equally plain that if there is a direction to sell and to pay the proceeds in shares to A., B., and C., then A., B., and C. are regarded, in equity, also as the owners of the estate. They can, by the doctrine of election, prevent any sale taking place, and, if they all express their intention, the trustees could lawfully convey the estate to them in the shares in which they are entitled to the purchase-money. The difference between the cases I have put of the proceeds going to one person or the proceeds going to several, consists in this: that where there are several they must all concur to stop the sale. I mention these points to shew how equity regards the substance of the matter, and considers those beneficially entitled to the purchase-money, as entitled to the estate itself. One other observation is material in regard to this point, which is, that where there is a trust for sale—a valid one, of course—and where there is no gift of intermediate rents, the persons who take the proceeds of sale, being thus regarded as equitable owners of the estate, unquestionably take the rent for the period during which the sale is postponed." Then he goes on to say: "I think it right to take the broader rather than the narrower view of the subject. I think the point made, on behalf of the heir-at-law, that the testator intended that the property should be taken in the shape of personalty, and not in the shape of realty, is insufficient to displace the conclusion at which I have arrived. The doctrine of election for the purpose of reconversion, which proceeds on the footing of the equitable property in the thing being vested in those that take the proceeds of sale, shews that the Court does allow persons thus entitled to take the property as of a different quality to that which the testator intended. Or, to put it quite shortly, where the testator intended that several persons should take a gift in

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money, they may all concur in saying, 'We will not take it in money, but we will take it in land.'"

Now in this case there is a clear intention, it seems to me, on the will, to benefit these particular persons who are ascertained; and that being the intention of the will, there is simply the failure of a piece of machinery which, if it had been effectual, might have enabled them to take it in a different shape. As it is, the intention stands; it is unaffected by the failure of the power of sale, and the persons entitled to it take it in the form in which it now is without going through the process of a sale. For these reasons I think the appeal fails.

ROMER L.J. I agree. I think the principle which governs the decisions of *In re Daveron* (1) and *Goodier* v. *Edmunds* (2), which had been previously indicated by Sir George Jessel in *Goodier* v. *Johnson* (3), was a right principle, and, when applied as it ought to be in the case before us, governs this appeal.

I take the will in the present case, and I look at it, disregarding in the first instance any question as to perpetuity at all, to ascertain what is the meaning of the testator; and having got that, then I apply the rules as to perpetuity. Looking at the will here, what do I gather with regard to the gift over to the persons who are to take in fifths in the events which have happened? I gather this: that the testator clearly intended those persons to have the beneficial interest in these freeholds; that he intended the trust for sale to be a means by which he would enable that property to be more easily divided between them, and to be enjoyed in substance. But I certainly gather from this will the intention that these persons should benefit in this property, and that, so far as there is a trust for them, it is clearly a trust which is perfectly good. Suppose the property under the trust for sale had not been sold for some years, who would have been entitled under this will to the rents and profits in the meantime, although there is nothing said on the face of the will with

(1) [1893] 3 Ch. 421. (2) [1893] 3 Ch. 455.
(3) 18 Ch. D. 441.

regard to it? Why, clearly the persons whom he has indicated as being the persons beneficially interested in the property. But suppose those persons had all been sui juris and had elected at the time to take the property without its being sold at all, putting aside any question of perpetuity. They could have said to the trustees, "Please hand us over this property unconverted." Why? Because the testator in this will has shewn that he regards those persons that he indicated as being the persons who are to have a beneficial interest under his will in the property, the persons to whom the property is beneficially given, and the trust for sale is the machinery for carrying that out.

In this particular case that intention of the testator is further shewn by the power of maintenance, although I desire to say for my own part that I should have come to exactly the same conclusion on this will even if the power of maintenance had not been found there. It appears to me that, having once come to the conclusion as to the meaning of the will, when you find that it is only the trust for sale which is invalid because of the law of perpetuities, but that the trust of the beneficial interest is good, then the Court does that which, in my opinion, it is bound to do in a case like that—namely, although the sale cannot be carried out, the trust for sale being bad, nevertheless it holds that the beneficial interest in the property has passed and is perfectly good, and should be enforced.

COZENS-HARDY L.J. I am entirely of the same opinion. We are really asked to differ from the dictum of Stirling J. in *Goodier* v. *Edmunds* (1) and from the actual decision of Chitty J. in *In re Daveron*. (2) The Master of the Rolls has referred in detail to Chitty J.'s judgment, and I would only read a sentence from Stirling J.'s judgment in *Goodier* v. *Edmunds* (3): "but where it can be seen that the trust for sale is mere machinery for facilitating a division between the persons for whom the property is destined, I think that effect

(1) [1893] 3 Ch. 455. (2) [1893] 3 Ch. 421.
(3) [1893] 3 Ch. 461.

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ought to be given to the equitable interests, even though the instrument by means of which the division is intended to be carried out may prove to be unavailing."

That seems to me, if I may say so, a perfectly clear and satisfactory statement of the law. It has been argued before us by Mr. Mulligan that the case depends upon some election by the beneficiaries. That seems to me to be a fallacy. The view taken by the Court in cases of this kind does not at all depend upon election. The right of election is only a consequence from the doctrine of equity that the persons who take the proceeds of sale are regarded in equity as the real beneficial owners. They do not take it because they elect to take it, but because they are beneficial owners, and the application by the Court of the doctrine of election is an illustration of the fact that they are beneficial owners. Like Romer L.J., I do not rely on the maintenance clause in any other sense than as an indication of intention; but I should certainly arrive at the same conclusion if the maintenance clause had not been there.

Solicitors: *Nisbet, Daw & Nisbet; Iliffe, Henley & Sweet, for Russell & Mackay, York; Stuart & Tull; Bloxam, Ellison & Co.; Edmonds & Turner; Caprons, Hitchins, Brabant & Co.*

W. C. D.

LAMPLOUGH *v.* COMPANY OF PROPRIETORS OF THE KENT WATERWORKS.

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[1903 L. 219.]

Waterworks Company—Surplus Profits—Dividend—Prescribed Rate—Making up Deficiency of Previous Dividend—Deficiency prior to Incorporation of General Act—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 1, 75.

A water company has no power to apply its surplus profits in making up to its ordinary stockholders any deficiency in the prescribed rate of dividend or a full 10*l.* per cent. dividend, if that is the prescribed rate, for any back years prior to the coming into operation of the Waterworks Clauses Act, 1847.

Scheme of the Waterworks Clauses Act and meaning of "dividend" discussed.

Decision of Joyce J. affirmed.

APPEAL from an order of Joyce J.

This was a motion for an interim injunction which raised the question whether a water company had any right to apply its surplus profits in making up to its stockholders a full dividend of 10*l.* per cent. for back years prior to the date from which the Waterworks Clauses Act, 1847, first became applicable to the company's undertaking.

The facts, so far as material, were as follows:—

The Company of Proprietors of the Kent Waterworks was incorporated by a private Act passed in the year 1809, by which the company was empowered to purchase certain waterworks which had an exclusive right, for a term of 500 years, to supply water to Greenwich and other places in the county of Kent. By this Act the company was empowered to raise 100,000*l.* capital in shares of 100*l.* each, the holders of which were to be entitled "to receive the entire and net distribution of an equal proportionate part, according to the money so by them respectively paid, of the profits and advantages that shall and may arise and accrue by the rates and other sums of money to be raised, recovered, or received by the said Company of Proprietors under the authority of the Act." The Act also empowered the company to raise further capital if necessary.

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Further Acts were obtained by the company in 1811, 1850, 1860, and 1862, giving powers of extension and raising fresh capital. In 1864, the company was amalgamated with the North Kent Water Company by another Act which, by s. 27, incorporated the Waterworks Clauses Act, 1847, in the following terms: "The Waterworks Clauses Act, 1847, shall apply from and after the passing of this Act to the whole of the undertaking and waterworks of the company." The date of the commencement of this Act was June 30, 1864. Before the passing of this Act of 1864 the company had been under no obligation as to supply, and there had been no limit upon the rates which it might charge, nor upon the rate of dividend which it might pay; though as a fact, in the early years of the company's existence, prior to 1814, the dividends had been low—not more than 6 per cent. Under another Act of 1877 there was a special issue of stock bearing a maximum dividend of 7*l.* per cent. All the company's share capital had now been converted into stock under the Companies Clauses Act, 1845, and, apart from the Waterworks Clauses Act, all the holders of ordinary stock of the company, except the holders of the special 7*l.* per cent. stock of 1877, were entitled to rank rateably in respect of dividend.

Sect. 1 of the Waterworks Clauses Act, 1847, provides that the Act "shall extend only to such waterworks as shall be authorized by any Act of Parliament hereafter to be passed, which shall declare that this Act shall be incorporated therewith."

Sect. 75 is as follows: "The profits of the undertaking to be divided among the undertakers in any year shall not exceed the prescribed rate, or where no rate is prescribed they shall not exceed" 10*l.* per cent. per annum "on the paid-up capital of the undertaking, which in such case shall be deemed the prescribed rate, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate."

No special rate being prescribed for the ordinary stock of this company by its special Acts, the "prescribed rate" was 10*l.* per cent.

Of late years the company had been sufficiently prosperous to be able to make up all deficiencies on previous dividends back to the year 1864, and it now proposed to continue making up to its ordinary stockholders a dividend of 10*l.* per cent. on their stock from the year 1809 down to June 30, 1864—a proceeding which it was stated involved a sum of about 700,000*l.*

The plaintiff, a holder of 2700*l.* of the special 7*l.* per cent. stock of 1877, commenced the present action against the company to prevent it from carrying out this proposal, and moved before Joyce J. for an interim injunction to restrain the defendant company from paying any dividend on any of its ordinary stock in respect of, or so as to make up, any deficiency, or alleged deficiency, of dividend occurring prior to June 30, 1864.

On February 19 Joyce J., being of opinion that the proposed payment of these back dividends was not within the powers of the company, granted the injunction asked.

The company appealed.

Cripps, K.C., and *R. J. Parker*, for the appellants. The company is entitled to regard the years prior to 1864, in which the shareholders did not as a fact get the full 10*l.* per cent. dividend, as being years in which there was a "deficiency" of previous dividends within the meaning of s. 75.

[ROMER L.J. Until there was a "prescribed rate," how could there be any deficiency? There was no prescribed rate until 1864.]

It must have been intended that some regard should be had to previous dividends. This was not a new company in 1864, and the Legislature could not have intended to cut off, as from that date, all the company's existing rights: that would have been a great injustice to the existing shareholders. Why should this old company be in a worse position than it would otherwise have occupied simply by reason of the incorporation in 1864 of the Waterworks Clauses Act? The Waterworks Clauses Act was only intended to apply to companies formed after 1847. The wording of s. 75 does not prevent the company from

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making up the deficiencies in dividends for years prior to 1864: as a fact, there never was a dividend prior to 1864 exceeding 6 per cent. "Dividend" in s. 75 means the thing to be divided up, i.e., what may be distributed by the company—not the quotient in the ordinary sense of the word "dividend." This machinery limiting the profits to be distributed to 10 per cent. is only provided in the interest of the consumers. Whatever the sum which in any one year is permitted by the Act to be distributed as profits is divisible among all the stockholders irrespective of the date at which the stock was created; it is distributable in respect of the whole of the ordinary stock of the company. In the case of an old company like the present there is nothing to shew that the provision as to making up deficiency in dividends up to 10 per cent. is not retrospective.

Younger, K.C., and *Ashworth James*, for the plaintiff, were not called upon.

COLLINS M.R., after stating the question for decision, the facts as to the origin of the company, and the incorporation of the Waterworks Clauses Act in 1864, and having read s. 75, and having referred to the payment of back dividends up to 1864, continued:—The company has now practically made up all deficiencies in dividend up to 1864, and it is now necessary, if it is to go on doing this, to find out whether it is entitled to pray in aid deficiencies before 1864, so as to justify a distribution by way of dividend (dividend in the ordinary popular sense) of something more than 10 per cent. It is contended for the company, in a very ingenious argument, that it is entitled to go back behind the period at which the Waterworks Clauses Act was incorporated, and to treat the deficiencies occurring before this provision was applicable at all, as enabling it now to enlarge the dividend beyond 10 per cent.

Now it seems to me that, on the fair and grammatical construction of the sections in this case and applicable to it, that contention cannot be supported. [After referring to the words by which the Waterworks Clauses Act was incorporated, his Lordship continued:—] Now what is the meaning of that? It seems to me those are words pointing to the application in

the future of the provisions of the general Act. And what are those provisions? The provisions are those contained in the 75th section which still speak for the future—from the date at which the general Act is applied, the company is to have the right of dividing profits at the prescribed rate, and of making up the deficiency of any previous dividend which shall have fallen short of that rate. The Act speaks from the time when it is passed, though in cases where it is incorporated it speaks from the time from which it is incorporated, and when it refers there to "the deficiency of any previous dividend" it is providing for the future; and when in future the company comes to distribute a sum by way of dividend and finds that it has more in hand than would suffice to pay the "prescribed rate" —that is, 10 per cent.—it looks back to see whether, from the time that Act came into operation which enables it to do that, there is a deficiency in a previous year. Of course there cannot be any deficiency in the first year, but there may be in the second, or the third; and so this company is in exactly the same position as a company that came into existence with these rights and these obligations and limitations on the day when the Waterworks Clauses Act was incorporated. This company is in no better and in no worse position: it was not bound, unless Parliament compelled it to do so, to incorporate the Waterworks Clauses Act into its undertaking; if it did so of its own free will it probably did so because on the whole it was considered that the advantages were equivalent to, and probably more than counterbalanced, any disadvantages. We have not been referred to all the numerous advantages which I have no doubt are contained in this Act of the Legislature—advantages possibly for the public as well as for the company; but I have no doubt in either view that advantages do exist. If the Act was imposed upon the company by the Legislature, equally it seems to me that certain obligations were imposed upon it in return for certain advantages acquired. Therefore, I cannot see the supposed injustice of cutting the company off from certain rights which it then enjoyed—rights which up to that date had not returned any very large profit, because the company was not in a very prosperous condition, and I do not

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think it had any immediate hope of being in a position to pay 10 per cent. at the time; and I do not suppose that it occurred to the company that it was giving up anything of very great value when it undertook to limit its dividends to 10 per cent., seeing that up to 1864 it had never paid more than 6 per cent., and there did not seem to be any immediate prospect of paying 10 per cent. It is not a matter of mere benevolence. In these cases a water company does not lower its rates out of pure goodwill to the public; it expects a larger return, and generally gets it, just as this company has got it. It was prepared, for its own advantage, it seems to me, to fix itself to certain rates. It had not derived any very great advantage from the unlimited right to charge unlimited rates before. It accepted the obligation of fixing its rates, it took on an obligation, or the qualified right rather, to pay dividends to the extent of 10 per cent., which it had never done before, and it took upon it the limitation, which I do not suppose it thought a very stern one at the time, of not paying more than 10 per cent., except in the event of its being able to shew that there were deficiencies in previous years to which that dividend might be applied, or which existing would justify it in paying a larger dividend.

That seems to me to be the scheme of the Act; and it seems to me that we are doing no injustice in giving that Act its natural construction—namely, that it takes effect, as the language of the section says, "from and after the passing of this Act"—that is, in 1864.

Now Mr. Parker has certainly addressed a very ingenious argument to us, which I hope I fully appreciated. I cannot be absolutely certain that I did: I thought I understood the argument, but where I failed was to see its direct application to the one point in issue in this case—whether this Act is retrospective and confers a power to take into consideration the deficit of the dividends before 1864; but this, at all events, does come out clear, that at the bottom of Mr. Parker's argument lies this proposition that "dividend" in the 75th section does not bear its popular sense, but means the total divisible sum. The sense in which ordinary persons use it is the sum received and paid as a quotient—the sum which they take and

receive as they receive interest. That is the sense in which throughout these proceedings it has been used by Mr. Parker's clients in the documents they have tendered to us where they give us the rates of dividend paid throughout, and it is the sense in which it has been used in the order of the learned judge, and, if I am not mistaken, in the notice of appeal. However, I will not affirm that. Now the order of the learned judge is this: "This Court doth order that the defendant company and its directors be restrained until the trial of this action or until further order from declaring or paying any dividend on any of the ordinary stocks of the defendant company"; the defendant company is arrested in the attempt to pay a dividend in the popular form. It is restrained "until further order from declaring or paying any dividend on any of the ordinary stocks of the defendant company in respect of, or so as to make up, any deficiency or alleged deficiency of dividends which may have occurred before the 30th June, 1864." I refer to that as shewing the sense in which the word "dividend" has been used by all the parties in this action. That is not, of course, sufficient. I come to the Act itself, and I am told by Mr. Parker that the word "dividend" in the 75th section means, not dividend in the popular sense, but the sum to be divided—dividend in the technical sense. So I look through the Act, and the first thing I come to is the next section—the 76th section—in which, on Mr. Parker's own shewing, "dividend" can mean nothing short of and nothing but dividend in the ordinary and popular significance—"and the dividends and interest arising from such securities shall also be invested." Mr. Parker admitted that "dividend," there, was dividend in the popular sense. The 77th section does not deal with that particular subject-matter at all, but s. 78 does; and here again I find: "When such fund shall, by accumulation or otherwise, amount to the prescribed sum, or one-tenth part of the nominal capital, as the case may be, the interest and dividends thereon shall no longer be invested." And here again I have Mr. Parker's admission that "dividend" is dividend in the popular sense. Then I come to the 79th section. In the 79th section I again

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find this: "will enable the undertakers to make a dividend of the amount aforesaid, and so from time to time," the "amount aforesaid" being at the prescribed rate of 10 per cent. "Dividend" again in the popular sense; and then, as the crown and climax, the last place in which "dividend" is referred to in this connection, I find this in s. 80: "and in case dividends to the amount hereinbefore limited have been paid, make such a rateable deduction," and so on. There can be no doubt that the only thing that was ever paid here was not the whole thing, but the specific part allotted by way of quotient to the individual shareholder; so that Mr. Parker starts with a strong presumption against him, that in this one particular s. 75 the Legislature should use the word "dividend" in the strictly technical Latin sense, whereas in all the others it uses it in the popular sense. Then I come to look at the section itself, and it seems to me it is only by a very artificial and refined train of reasoning that you can put on it any sense other than the popular sense. It seems to me, therefore, that the Act is capable of a very simple and natural meaning, applying to the words their ordinary grammatical sense, and that no injustice whatever is done by giving it that sense. In point of fact I think in this case the judgment of the learned judge below, though very short, was perfectly right, and exhausts the question, and I should not have added anything myself except that I thought myself bound, in deference to the very ingenious argument of Mr. Parker, to say a few words on the matter. In my opinion this appeal must be dismissed.

ROMER L.J. I am of the same opinion, and will only add a few words. Before the Act of 1864 this company was able to divide, and no doubt did divide, all its profits amongst its shareholders by way of dividend without any limitation. There was no limit as to dividend at all, and accordingly it would have been impossible for the company to have pretended in any one year to have altered the dividend of a prior year, or to have appropriated the profits available for distribution amongst them in any one year to some past year which had

been disposed of. In other words, with regard to this company up to the passing of the Act of 1864, there could not be said to have been in respect of dividends any deficiency at all in any true sense of the term. We then come to the Act of 1864, which incorporated the Act of 1847 for the first time, and so far as that Act of 1847 is concerned it may almost be said that there is a new incorporation, at any rate quâ that Act of 1847. It is said on behalf of the appellants here that it was a great hardship to incorporate that Act of 1847, and that at any rate it would be an even greater hardship unless they were successful on this appeal. The answer is, this company took the benefit of the new Act with its advantages and its disadvantages. It had to go to Parliament to get some fresh powers, amongst others the right to incorporate another company and acquire its undertaking; and the Legislature, I presume, thought fit to impose upon this company the obligation of taking the appropriate sections of the Act of 1847 with their benefits and their liabilities, and the bargain was struck, and here we have the company subject now to the provisions of the Act of 1847. By s. 27 of the Act of 1864, even if it needed that section to shew it, it is perfectly clear that the provisions of the Act of 1847 which we have to consider are only to take effect from and after the passing of this—the 1864—Act so far as concerns this company. In other words, they are to have no retrospective effect at all, and, indeed, it is difficult to see how they possibly could. Before the passing of the Act of 1864, in the prior years of this company, there might or might not have been years in which it had applied by way of profit amongst its shareholders unlimited dividends exceeding the prescribed rate of 10 per cent.; but you could not possibly say, now that the Act of 1847 has been incorporated, you could treat the past years as years in which there was any limitation by way of dividend—any limitation by way of the profits which could be divided between the shareholders by way of dividend. Of course you could not say anything of the kind. There was no limit, and you could not have impeached any one year as having paid more than 10 per cent.

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or required the company to account for any excess, if any there had been. The provisions, as I have said, of the Act of 1847 were not retrospective, and were only intended to apply, as appears to me, to the coming years so far as concerns this part of the case. Then the appellants say, "Oh, we want to regard the years before 1864, where we, the shareholders, did not as a matter of fact get the full 10 per cent., as being years in which there was a deficiency within the meaning of the phrase as it is used in the Act of 1847." The first answer is, I think, that the Act of 1847 had after its incorporation no relation whatever to any deficiency in the prior years. As I have pointed out with regard to those prior years, you could not say there was any such thing as a deficiency existing.

And if you look at the wording of s. 75, on which the appellants have to rely in order to enable them to distribute dividends in respect of a past deficiency, how is it worded? That section says this—that they must have a limit to the amount they distribute by way of dividend, "unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate," the "yearly rate" there to my mind clearly meaning the prescribed rate—prescribed, as I have pointed out for this company, for the first time, to take effect after the passing of the Act of 1864. How could it be said within the meaning of those words that the years before 1864 fall within the provisions of the section? The section shews to my mind that it is only dealing with years where there was a limited maximum dividend in respect to which it could be said that there had been a deficiency, and a dividend which, within the words of the section, had fallen short of the prescribed rate. To my mind both the wording of the section and the spirit of it, and the general considerations applicable to the case, shew that these years before 1864 cannot be regarded at all as coming within the operation of s. 75, or being affected or operated upon, if I may use the expression, by the Act of 1847 at all. It appears to me that Joyce J. was quite right in the decision he has come to, and that this appeal fails.

COZENS-HARDY L.J. I am of the same opinion, and I have very little to add. It is important to remember, dealing with the Act of 1847 alone, that according to its terms it contemplated only waterworks to be thereafter authorized by Act of Parliament, which Act of Parliament should declare that this Act of 1847 should be incorporated therewith, and it is with reference to a company of this kind that s. 75, which has been so much discussed, is enacted. Putting it shortly (for I will not read that section again), it prescribes a certain rate of dividend which may not be exceeded; but it provides, as a qualification or limitation on that, that there may be a larger dividend required to make up the deficiency of any previous dividend which shall have fallen short of the said yearly rate. Now on the construction of that section, taking the Act of 1847 alone, it is, I think, plain that there can be no deficiency within the meaning of that section except during the period when there is a "prescribed rate."

Then, however, we come to the Act of 1864, by s. 27 of which it is enacted that, amongst other things, s. 75 of the Act of 1847 shall apply "from and after the passing of this Act to the whole of the undertaking and waterworks of the company." Why is s. 75 to be interpreted differently in that case from what it would have been interpreted if the company had been for the first time incorporated by that Act of 1864, which by s. 27 made the Waterworks Act apply to it? It seems to me that to this company, as to any other, we are bound to say that there can be no deficiency except during the period when there is a prescribed rate.

In my view it is not necessary to express any opinion upon the point which was so ably argued by Mr. Parker. I will assume that he is right, and, though it is not necessary to decide it, the inclination of my opinion is that he is right, in saying that whatever sum is in any given year taken and permitted to be divided by way of dividend is divisible among the then shareholders of the company; but the question before us is really the quantum which has to be divided. In my view we are not concerned here with the persons who are entitled as between themselves to receive the amount which is

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distributed. I only desire to keep a perfectly open mind upon that point whenever the question may arise.

The motion was by consent then treated as the trial of the action, and the injunction was made perpetual.

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W. C. D.

C. A. 1902 BUCKLEY J. *April* 23, 24, 25, 26, 30. C. A. 1903 *Jan.* 23, 24, 26, 27.

BROOME *v.* SPEAK.

[1901 B. 5284.]

Company—Prospectus—Promoter—Contract—Remuneration—Bonus — Commission—Quantum Meruit—"Material" Contract—Omission from Prospectus—Legal Advice—Directors, Liability of—"Knowingly issuing" Prospectus—"Fraudulent" Prospectus—"Untrue Statement"—Shareholder, Rights of—Damages, Measure of—Compensation—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Directors Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3, *sub-s.* 1.

A "contract" required by s. 38 of the Companies Act, 1867, to be specified in a prospectus means a contract that is "material"—one which, whether deterrent or not, an intending investor ought to have an opportunity of considering in order to decide whether to apply for shares or not.

The statement by Baggallay L.J. in *Sullivan* v. *Mitcalfe*, (1880) 5 C. P. D. 455, 464, as to what contracts s. 38 requires to be specified in a prospectus, approved.

On September 21, 1898, the directors of a newly incorporated company entered into a contract by letter with B., its promoter, confirmed by a resolution of October 1, that, in consideration of his advancing a sum of 14,250*l.* to enable the company to pay the deposit on its intended purchase of an undertaking introduced by him, and of his taking upon himself the risk of forfeiture of the deposit in the event of non-completion of the purchase, the company would repay the deposit by a certain day "together with 7500*l.* bonus for such loan."

The deposit was then raised by B. and paid to the vendors. Subsequently by a contract, by resolution of the directors, of October 10, 1898, between B. and the directors, upon their giving him "assurance that his right to recover proper remuneration for commission on introducing the business" of the purchase "and raising the necessary deposit shall be honourably met at a future meeting of the directors," the contract of

September 21 was "cancelled," and the subject was "adjourned to a future meeting of the board."

On October 20, 1898, the directors issued a prospectus stating that certain contracts therein specified were the "only" contracts entered into by the company, no reference being made to either of the two contracts of September 21 and October 10, 1898. On the faith of that prospectus the plaintiff applied for 400 10*l.* shares in the company, which were duly allotted to him on October 26, 1898, and he paid 1000*l.* upon them.

In January, 1900, the company went into liquidation, and in December, 1901, the plaintiff brought an action against the directors claiming, under s. 38 of the Companies Act, 1867, to have the prospectus declared fraudulent by reason of the omission of the two contracts, with damages; and also, under s. 3, sub-s. 1, of the Directors Liability Act, 1890, compensation for the alleged "untrue statement" in the prospectus:—

Held, by Buckley J. and by the Court of Appeal, that both contracts were such as were material to be specified in the prospectus, and that as the defendants had, even though they might have done so innocently and on legal advice, "knowingly issued" the prospectus containing an "untrue statement," the plaintiff had established his case both under s. 38 of the Act of 1867 and under s. 3, sub-s. 1, of the Act of 1890: also that the plaintiff was entitled to damages, the measure being the difference between the price he paid for the shares and their fair value at the date of allotment: *Peek* v. *Derry*, (1887) 37 Ch. D. 541, 592.

THE London and Northern Bank, Limited (below called "the company"), was incorporated on April 6, 1898, with a nominal capital of 2,000,000*l.* in shares of 10*l.* each. Paul Speak was the chairman of directors of the company, and Alfred J. Shepheard and Charles D. Clayton were two of its directors. By its memorandum the company had power to remunerate any person for services rendered in placing shares or debentures, "or in or about the issue, formation, promotion or establishment of the company, or the conduct of its business."

The promoter of the company was one William Bowden, and Charles E. Craig and J. D. Haddock were nominees of his, subject to this qualification, that Haddock sometimes acted for and personated the company. It was originally contemplated that the company should start a banking business of its own, and not purchase any existing business. By an agreement in writing of May 9, 1898, between Haddock (representing Bowden) and the company, Haddock, or, in other words,

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Bowden, was to have, as his return for paying the preliminary expenses, a sum equal to 1 per cent. on the nominal capital—that is, 20,000*l.*, and also the option of calling for a large number of shares.

Bowden having got into communication with Speak, the idea was conceived, about August, 1898, that the company should buy the existing business of the Leeds Joint Stock Bank, Limited (below called the Leeds Bank), and negotiations as to this were carried on by Bowden and Speak. The Leeds Bank required, as a condition of the negotiations proceeding, payment of a cash deposit of 14,250*l.*, being 10 per cent. on the purchase-money (which was to be 142,500*l.*). The company agreed to this, and the board at a meeting of September 7, 1898—at which Bowden was present, and also Speak, who acted as chairman, but from which Shepheard and Clayton were absent—passed a resolution "that the directors present, having heard the statement of the chairman and Mr. Bowden as to the proposed purchase of the Leeds Joint Stock Bank, Limited, are of opinion that the London and Northern Bank, Limited, should complete the said purchase on the terms proposed, provided that the directors proceed to allotment on a guarantee or subscription of at least 200,000*l.* preference shares and 200,000*l.* ordinary shares, and that the affairs of the Leeds Joint Stock Bank, Limited, are favourably reported on by an expert accountant."

At that time the company had neither money nor credit. They had obtained no shareholders beyond the few on the formation of the board, they had not proceeded to any allotment to the public, they had not any business premises or anything else, and, in short, were in an initiatory stage.

Under these circumstances the company, not having themselves the means of paying the deposit of 14,250*l.*, applied to Bowden to advance them that sum, which he agreed to do, also agreeing to take the risk of forfeiture on certain terms. These terms were embodied in a letter of September 21, 1898, which was signed by Haddock as "trustee for the bank" (the company) and addressed to Craig (representing Bowden), and was as follows: "Dear Sir,—In consideration of your advancing

me the sum of 14,250*l.* to enable me to pay the same to the Leeds Joint Stock Bank, Limited, as a deposit on the purchase of their undertaking and assets, and your taking the risk of forfeiture, I hereby agree to repay the same on directors going to allotment, or on the 30th October next, together with 7500*l.* bonus for such loan."

As Buckley J. found, the effect of that letter was that Craig (namely, Bowden) took the risk of forfeiture in the event of the purchase falling through, in return for which the company, acting by Haddock as its agent, agreed (*a*) to repay the deposit; (*b*) to pay Bowden the bonus; and the letter was written with a view to the following purchase agreement.

On September 26, 1898, an agreement was entered into between the Leeds Bank and Haddock, as trustee for the company, for the sale of the assets of the Leeds Bank to the company for 142,500*l.*, to be paid at the Leeds Bank's option in cash, or wholly or partly in shares. The agreement provided for a deposit of 14,250*l.* in cash and for forfeiture of the deposit (after notice) in case of non-completion (except through the wilful default of the Leeds Bank) on December 20, 1898.

Thereupon the deposit was paid to the Leeds Bank in the following manner: Speak gave his cheque for 7125*l.*; Bowden gave his draft for 7500*l.*; and, as the two sums amounted to 375*l.* more than the amount of the required deposit, the two cheques were accompanied by a letter from Bowden, saying: "I beg to hand you herewith Mr. Speak's cheque for 7125*l.* and my draft for 7500*l.*, making in all 14,625*l.* Deducting the amount of the deposit from this, there will be a balance in my favour of 375*l.* Be good enough to hand Mr. Haddock a draft on London for this amount."

Buckley J. found that the payment by Speak was made under an arrangement between him and Bowden that Speak should find half the deposit and have half the bonus, but that until March 3, 1899, the other directors did not know about the matter, and he absolved Shepheard and Clayton "from any knowledge of that which was an improper bargain, that the chairman of the company should share with Bowden, the promoter, this bonus of 7500*l.*"

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At a board meeting of the company, held on September 27, 1898, at which Speak (but not Shepheard or Clayton) was present, and also Bowden, it was resolved that the agreement of September 26 should be read and adopted on behalf of the company, and that the seal should be affixed thereto, "it being understood that the bank"—namely, the company—"incur no liability under such agreement either to complete the purchase or to find the deposit therein referred to, such deposit having been found by Mr. Craig at his own risk"; and the minute proceeded: "The commission note given by Mr. Haddock to Mr. Charles Craig"—namely, the letter of September 21—"in consideration of the latter finding the deposit and risking same in connection with the purchase of the Leeds Joint Stock Bank, Limited, agreeing to pay a commission of 7500*l.* on the purchase of the Leeds Joint Stock Bank, Limited, was produced and read, it being arranged that the adoption of the said commission note should be recommended for confirmation at the next meeting of the board, when a fuller attendance of the directors might be present."

At a board meeting of the company held on October 1, 1898, at which Speak, Shepheard, Clayton, and other directors were present, resolutions were passed of which there was the following minute: "That the agreement with the Leeds Joint Stock Bank, Limited, be referred to Messrs. Walker & Rowe"—the solicitors of the company—"to peruse on behalf of the company, and to advise the directors as to its full effect, particularly as to whether it is clear that the bank incur no liability either for completion or on account of the deposit. . . . The subject of the commission note to Mr. Craig was considered, and it was resolved that in consequence of Mr. Craig having found the deposit at his own risk the board agrees to repay the same with a bonus of 7500*l.* if the directors go to allotment, and when the purchase is completed."

On the same day the secretary pro tem. wrote to Craig: "I am instructed to acknowledge receipt of your letter of 21st ultimo, which I placed before my directors at their meeting to-day, and to say that in consequence of your having introduced the business, and carried through the negotiations,

and found the deposit in connection with the purchase of the Leeds Joint Stock Bank, Limited, my directors agree to repay you the same, together with a bonus of 7500*l*." The resolution of October 1 was confirmed at a board meeting held on October 5, 1898.

On October 10, 1898, there was another board meeting of the company at which Speak and Shepheard were present, but not Clayton. Bowden attended that meeting, and there were present also two directors of the Leeds Bank who, it had been agreed, were to join the board of the company. These two directors expressed their strong disapproval of the proposed bonus of 7500*l*. to Bowden, which they considered excessive, and a long discussion upon the subject took place. Eventually the following resolution was passed: "That after full discussion and hearing the views of the directors of the Leeds Joint Stock Bank, Limited, and upon the chairman giving Mr. Bowden assurance that his right to receive proper remuneration for commission on introducing the business of the Leeds Joint Stock Bank, Limited, and raising the necessary deposit, shall be honourably met at a future meeting of the directors of the London and Northern Bank, Limited, it is resolved, with the assent of Mr. Craig, that the contract contained in the letter of the 21st September, 1898, be cancelled, and that the subject be adjourned to a future meeting of the board."

On October 18, 1898, Craig wrote to Haddock as follows: "Referring to the letter which you wrote to me dated the 21st September, 1898, I understand that the directors of the London and Northern Bank have passed a resolution to the effect that the claim which I may have for commission in introducing the business of the Leeds Joint Stock Bank, Limited, or for raising the necessary deposit, shall be honourably and properly met. Having regard to that assurance, I am quite willing to agree to the terms of your letter to me being cancelled, and the arrangement there suggested being considered at an end."

On October 20, 1898, at a meeting of the board, Speak, Shepheard, Clayton, and other directors of the company being

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present, and also Bowden, the resolution of October 10 was read and confirmed, and then the meeting sanctioned a prospectus to the public inviting applications for shares in the company. The minute as to the prospectus was as follows: "The prospectus of the company was read and considered again, and it was resolved that as altered the same be adopted as the prospectus of the company, and that it be issued to the public forthwith." Upon the same day, October 20, the prospectus was issued. The original prospectus had referred to the letter of September 21, but this reference was omitted in the prospectus as issued, and the prospectus also made no reference to the resolution or contract of October 10. The prospectus as issued mentioned two contracts designated A and B, to which it is unnecessary to refer, and stated that those were the "only" contracts to which the company was a party. It also contained the usual waiver clause as to any contracts that might technically fall within s. 38 of the Companies Act, 1867.

Subsequently to the issue of the prospectus Bowden, through Craig, brought an action for his commission or bonus of 7500*l.*, but the action was settled on payment to Bowden of 1500*l.* The plaintiff, Joseph Broome, received a copy of the prospectus as issued, and on the faith of it applied, on October 24, 1898, for 400 ordinary 10*l.* shares in the company. On October 26 those shares were allotted to him, and he paid 1000*l.* upon them.

On December 29, 1899, the company passed an extraordinary resolution for voluntary winding-up, and on January 17, 1900, the voluntary winding-up was ordered to be continued under the supervision of the Court.

On December 27, 1901, Broome commenced this action against Speak, Shepheard, and Clayton, in which he alleged, by his statement of claim, that there were three contracts that ought to have been mentioned in the prospectus, but that the prospectus omitted all reference to them, or any of them, neither specifying their dates nor the parties to them: those three contracts being, (*a*) between the company and Craig, as Bowden's nominee, for repayment of the 14,250*l.* and the bonus of 7500*l.*—this contract being alleged to be contained in

Haddock's letter to Craig of September 21, 1898, and the letter from the secretary to Craig of October 1, 1898; (*b*) the verbal contract referred to in the resolution of October 10, 1898; and (*c*) the contract contained in Craig's letter of October 18, 1898.

By his statement of claim the plaintiff made the following further allegations:—

"9. The said prospectus contained certain false representations and untrue statements, of which the following are particulars:—

"(1.) The prospectus stated that the only contracts to which the company was a party were two contracts therein described, and designated A and B, whereas in fact the company was also a party to the further and most material contract in writing above mentioned between the company and Craig, as nominee for Bowden, with regard to the advance of the said sum of 14,250*l.* by the said Bowden, and the repayment of the same to him, together with a bonus thereon of 7500*l.*; and the company was also a party to the said further and verbal contract with the said Bowden with regard to the payment of the said bonus.

"(2.) The prospectus stated that there were other contracts between the said J. D. Haddock, as trustee for the company, and other persons with whom he had entered into arrangements with respect to the formation of the company, in addition to the said contracts designated A and B, but omitted all reference to the contracts above mentioned."

"10. The representations and statements in the last paragraph mentioned were, and each of them was, false to the knowledge of the defendants and each of them, and were made fraudulently in order to conceal the existence of the said contracts with regard to the said advance and bonus, and in order to induce persons receiving the said prospectus to apply for shares, and the plaintiff was thereby induced so to apply.

"11. Had the plaintiff been aware of the falsity of the said representations and statements, or of the existence of the said material facts omitted in the prospectus, he would not have applied for or taken shares in the said company."

The plaintiff claimed (1.) a declaration that the prospectus

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must be deemed fraudulent on the part of the defendants, who knowingly issued the same without specifying the dates and names of the parties to the contracts omitted; (2.) 1000*l.* damages for the said fraud, with interest at 4 per cent. thereon; (3) alternatively, the same sum by way of compensation to the plaintiff for the loss or damage suffered by him by reason of the untrue statements referred to in paragraph 9; (4.) damages under paragraph 10; (5.) further or other relief; (6.) costs.

The action came on for trial before Buckley J. on April 23, 1902.

Several witnesses were examined and cross-examined, including the three defendants. The general nature of the evidence sufficiently appears from the judgment of Buckley J. and from the judgments of the Court of Appeal.

Astbury, K.C., and *J. Roskill*, for the plaintiff. Our contention is that the letter of September 21, 1898, and the agreement embodied in the resolution of October 10, 1898, were "contracts entered into by the company" within s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), and should therefore have been specified in the prospectus. As the plaintiff had no notice of either of those omitted contracts the prospectus must be "deemed fraudulent" on the part of the defendants as regards him. If we are right under that section, we are equally entitled to succeed in our claim to compensation under s. 3, sub-s. 1, of the Directors Liability Act, 1890 (53 & 54 Vict. c. 64), which enacts that every person who is a director at the time of issuing a prospectus or notice inviting subscriptions for shares "shall be liable to pay compensation to all persons who shall subscribe for any shares . . . . on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice." It will be contended on behalf of the defendants that the letter or contract of September 21 was cancelled by the resolution of October 10 which recorded the verbal agreement of both parties—for Bowden was present at the meeting at which that resolution was passed; but the true view is that the previous contract was not cancelled altogether: the reso-

lution merely varied the previous arrangement by cancelling the bonus, leaving the relation between the parties under the previous contract otherwise untouched. In short, the resolution constituted a contract of variation, and that contract, as well as the contract varied, are within s. 38. The cancellation of the contract of September 21 by the resolution could only be on the ground of accord and satisfaction under the resolution, but the accord and satisfaction were executory only, and never having been executed cannot be pleaded: *Bayley* v. *Homan*. (1)

Sect. 38 is repealed by the Companies Act, 1900 (63 & 64 Vict. c. 48) (2); but this part of the section is re-enacted by s. 10, sub-s. 1. Our right of action existed before the Act of 1900 came into operation; the right commenced on allotment, on October 26, 1898, and therefore is not affected by the Act of 1900. The money claimed has been a debt due to the plaintiff by the directors ever since it was paid. By s. 38, sub-s. 2 (*b*) and (*c*), of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), repeals are not to affect anything done or any rights accrued under a repealed enactment. In this prospectus there is a definite statement that there are only two contracts. This case is covered by the decision in *Cackett* v. *Keswick*. (3)

Haldane, K.C., and *F. Cassel*, for the defendant Shepheard. Admitting that the plaintiffs have a right of action and can proceed under s. 38, there has been no fraud or deceit. It is not enough to shew that a false statement has been made; it

(1) (1837) 3 Bing. N. C. 915, 920; 43 R. R. 854.

(2) Sect. 38 of the Companies Act, 1867, since repealed by s. 33 of the Companies Act, 1900, was as follows:—

"Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

(3) (1901) 17 Times L. R. 664; since reported [1902] 2 Ch. 456.

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must be proved that the person who made it had no reason to think it was true: *Derry* v. *Peek*. (1) The verbal understanding with Bowden was not a contract at all, and the statement that there were no contracts except those which were specified was strictly true. Even if the directors made a mistake about that, they are within the principle of *Derry* v. *Peek*. (1)

The principle that a man must be taken to know the general law of the land does not apply to questions of construction of documents and questions as to what amounts to an agreement: *Cooper* v. *Phibbs* (2); *Earl Beauchamp* v. *Winn*. (3)

[*Astbury, K.C.* I admit that proposition.]

This is not a question of uberrima fides, but of legal rights in an action for deceit. The first agreement was cancelled, and the verbal arrangement did not amount to a contract on which Bowden could have sued: *Taylor* v. *Brewer* (4); *Roberts* v. *Smith* (5); *Loftus* v. *Roberts*. (6) It was only an honourable understanding, and no quantum meruit was implied: *Bryant* v. *Flight*. (7) Bowden's position as a director prevented him from claiming a quantum meruit, and the commission promised to him was simply a gratuity under the power conferred by the articles to pay money for promotion services.

The directors have acted in good faith and have done all they could to comply with the requirements of the statute. In omitting this so-called contract they were acting on the advice of counsel. A contract which has been cancelled or performed need not be disclosed. A contract for sale of real estate need not be disclosed if it has been followed by conveyance.

[BUCKLEY J. It might disclose information, and thus be material.]

There might be such a case, but the plaintiff cannot say that he took these shares under circumstances which made it material that he should know that there had been this letter of September 21. To make the prospectus fraudulent it must be shewn that the directors "knowingly" omitted a contract.

(1) (1889) 14 App. Cas. 337.
(2) (1867) L. R. 2 H. L. 149.
(3) (1873) L. R. 6 H. L. 223.
(4) (1813) 1 M. & S. 290; 21 R. R. 831.
(5) (1859) 4 H. & N. 315.
(6) (1902) 18 Times L. R. 532.
(7) (1839) 5 M. & W. 114.

We thought there was no contract; so there has been no omission with knowledge: *Twycross* v. *Grant*. (1) Even if it is necessary to disclose contracts which are past and gone, and even if this particular transaction constituted a contract, it was not material within the authorities. It would have been impossible to give dates and names as required by s. 38. The burden is on the plaintiff to shew that he has sustained any damage: *Arkwright* v. *Newbold*. (2) The defendants do not desire to rely on the waiver clause in the application form as a release from all claims, but they do contend that it gives notice that there are other contracts; and it shews that there was no fraudulent intention.

[They also referred to *Angus* v. *Clifford*. (3)]

Bankes, K.C., and *O. L. Clare*, for Speak.

Warmington, K.C., and *Hon. F. Russell*, for Clayton, adopted the arguments which had been urged on behalf of Shepheard.

Astbury, K.C., in reply, referred to *Sullivan* v. *Mitcalfe* (4); *Goss* v. *Lord Nugent* (5); *Arnison* v. *Smith*. (6)

BUCKLEY J. (after stating the nature of the action and the facts down to and including what happened on October 1, 1898). Pausing there, it is quite plain that those three documents—the letter of September 21, 1898, and the minutes and letter of October 1, 1898—constituted a contract between the company and Craig, or Bowden, as to the payment of the 7500*l*. bonus and the repayment of the deposit of 14,250*l*. [He then referred to the arrangement that Speak should share the bonus, and continued:—] So far I have two contracts which are within s. 38 of the Companies Act, 1867, a contract constituted by the three documents I have mentioned, and the arrangement—known to Speak but not to the others—that Speak and Bowden should share the 7500*l*.

At the meeting of October 10 a resolution was passed which becomes of vast importance at a later stage of the case. The effect of it was that to some extent, and for some purposes, the

(1) (1877) 2 C. P. D. 469, 542.
(2) (1881) 17 Ch. D. 301.
(3) [1891] 2 Ch. 449, 469.
(4) 5 C. P. D. 455.
(5) (1833) 5 B. & Ad. 58; 39 R. R. 392.
(6) (1889) 41 Ch. D. 348.

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arrangement which had been made by the letters of September 21 and October 1 was put an end to and something was substituted for it; the question will be, what that something was.

On October 18 Craig wrote a letter to Haddock [which his Lordship read]. Attributing to that letter the effect of a complete cancellation of the letter of September 21, or treating it as a cancellation of that letter to some extent only, it seems to me that at that stage you have, in the letter of October 18, a contract by the company cancelling wholly or in part the contract constituted by the three documents which I first referred to.

[His Lordship then referred to the meeting of October 20, and the settlement of Craig's action, and stated the terms of the resolution of October 10, and what took place at the meeting of that date, as to which his Lordship said, in reference to the evidence given by Shepheard, "I desire to say that Mr. Shepheard in the box gave me every satisfaction. It appeared to me that he gave his evidence in a perfectly proper and straightforward way, and I treat it with every respect; I am sure he was endeavouring to tell me plainly and frankly the whole of the truth." His Lordship then continued:—] This resolution of October 10 was arrived at for the purpose of expressing that, although the letter of September 21, so far as regarded the payment of the 7500*l.*, was to go, it was to be replaced by something else, and the something else is that which is to be found in this resolution.

It is contended, on behalf of the defendants, that the meaning and result of this resolution was that Mr. Bowden, when he left the meeting, was to be in such a position as that he was not to be entitled as of right to a single penny—that he was to throw himself upon the honour, or good feeling, or generosity of the board as to whether he should have anything or nothing. I do not think that was the result of it. The chairman at that meeting, as the price of the destruction of the letter of September 21, so far as it was destroyed, gave an assurance, and in so doing he was acting as the representative of the board, or, to speak more correctly, as the representative of the company;

he was not personally giving the assurance. Looking at the language of the resolution, and remembering what the situation was, I think the intention was to reserve a right, and that Mr. Bowden acted upon the footing that his right to receive something was admitted. What was the proper amount was not admitted; the question of amount was left to honour in this sense, that it was to be a fair and proper sum—not a sum to be paid only as a debt of honour. [After referring to the evidence on this point, his Lordship continued:—]

Now what is the state of the law which I ought to apply to this case, having regard to *Taylor* v. *Brewer* (1), *Bryant* v. *Flight* (2), and *Roberts* v. *Smith*. (3)

What I have to decide, having regard to those authorities, is whether there was a mere promise, leaving it in the discretion of the promisor to say what the promise was to be, or a contract upon which Bowden could have sued. In *Taylor* v. *Brewer* (1) in 1813 the words were to this effect: "Such remuneration as shall be deemed right"; and in *Roberts* v. *Smith* (3) in 1859 the words were: "Any remuneration you may think me deserving of." In both these cases it was held that an action would not lie. In *Bryant* v. *Flight* (2) in 1839 the words were: "The amount of payment I leave entirely to you." It was held in that case that an action would lie, but Parke B. dissented. Now all those cases were considered the other day in the Court of Appeal in *Loftus* v. *Roberts* (4), and Vaughan Williams L.J. sums them up by saying this: "The decision in the first of these cases and in the third, and the dissentient view of Parke B. in the second, was this—that wherever words which] by themselves constituted a promise were accompanied by words which shewed that the promisor was to have a discretion or option as to whether he would carry out that which purported to be the promise, the result was that there was no contract on which an action could be brought at all. The doctrine was an old one. In Leake on Contracts, 3rd ed. p. 3, it was expressed thus: 'Promissory expressions reserving an option as to the performance do not create a contract.'"

(1) 1 M. & S. 290; 21 R. R. 831.
(2) 5 M. & W. 114.
(3) 4 H. & N. 315.
(4) 18 Times L. R. 532, 534.

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That being the law which I have to apply, what is the effect of the resolution of October 10, 1898? To my mind it did not constitute a promise with a discretion in the promisor. There existed at its date a legal obligation as between the company and Bowden. That was to be put an end to so far as the payment of the 7500*l.* was concerned; but what was to be substituted for it was that the right of Bowden to receive something was to be admitted. The amount that he was to receive was not admitted, but what might be a proper amount was to be honourably paid in the sense, as I understand it, that he was to be fairly and reasonably dealt with. For those reasons I come to the conclusion that the minute of October 10, 1898, produced another contract.

Now, with that I must go to the law. In the first place, it has been argued before me that s. 38 of the Companies Act, 1867, does not extend beyond executory contracts. I think that that is not so. That section has always created very considerable difficulty as to what is the proper limit to be put upon the very wide effect of the generality of the expressions contained in it; but I see no reason for so cutting down the words "contracts entered into by the company" as to exclude a material contract entered into by the company, because in point of fact that contract has been wholly executed. Suppose a contract between the promoter and every member of the board that the promoter will pay the intending director 1000*l.* for serving on the board, and that in return for that the director shall allow himself to be appointed one of the first directors, and suppose that the money has been paid and that the director has joined the board and the contract is wholly executed. It seems to me that that would still be a contract entered into by a promoter as such, and by a director, before the issue of the prospectus, and that it would be a material contract, and I see no reason for cutting down the language of the section so as to exclude such a contract. Again, suppose there is a contract for the sale of property of any kind from A. to B., and that that has been wholly executed by a conveyance from A. to C. by the direction of B., but that B.'s name does not appear on the conveyance, and that B.'s name was one which, as being that of the promoter

or for some reason or other, would have been naturally looked at by the intending investor, and that if he had known that B. was interested in the matter it might have influenced him in taking shares. Why is not that executory contract (which certainly was entered into by the promoter or director, possibly by the company, in the case which I am putting) within the words "contracts entered into," because it has been completed by a conveyance, if the disclosure of B.'s name would have been material? To take another illustration: Suppose there was a contract, a material contract, running, say, for a period of five years which has expired—that is a contract entered into by the company, and I see no reason for restricting the generality of the language of the section so as to exclude it.

Now, what I have been addressing myself to so far is the contract contained in the letter of September 21 and the minute and the letter of October 1. It is true that at the date when the prospectus was issued—at least, I will assume for a moment that it is true—that had been put an end to, but it was a material contract, and I think as such it ought to have been disclosed, and that the prospectus ought to have contained the dates and the names of the parties to those three transactions, namely, the letter of September 21, the minute of October 1, and the letter of the same date. But by the minute of October 10 and the letter of October 18 another contract was entered into, namely, a contract cancelling the previous contract, or cancelling it to some extent. That was a subsisting contract at the date of the prospectus, and why should not that have been disclosed? It appears to me again that that is within the section. They ought to have disclosed, by stating the dates and parties, the matters of September 21, October 1, October 10, and October 18. I think all those matters ought to have been disclosed in order to satisfy s. 38. Then, thirdly, it seems to me that the letter of September 21 was not cancelled by what took place on October 10 and 18. It contained two parts—the obligation to return the deposit and the obligation to pay the bonus. As regards the latter it was put an end to, but as regards the former it was not; there was a subsisting contract as to that. The company

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still remained bound to repay the 14,250*l.* deposit; and again, as regards that, I think it was a subsisting contract, and as such ought to have been disclosed.

Then lastly, if I am right in the view which I take as regards the effect of the minute of October 10, that created a new obligation—not a mere debt of honour, but something that was binding on the company, and therefore was a contract; and that again, I think, ought to have been disclosed under s. 38.

It is true that s. 38 of the Companies Act, 1867, has been repealed by s. 33 of the Companies Act, 1900; but, having regard to s. 38 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), it seems to me—and the defendants have not disputed it—that the plaintiff's right in this action is a "right" "acquired" or "accrued" under that repealed enactment, and that this legal proceeding can be instituted as if the repealing Act had not been passed. It seems to me, therefore, that the plaintiff is in a position to avail himself of the statutory fraud arising upon s. 38 of the Companies Act, 1867, and I think that he succeeds upon that statutory fraud.

There are two other matters upon which the action might fall to be decided. First is the Directors Liability Act, 1890. Upon that what one has to investigate is whether there was an "untrue statement" in the prospectus or notice, made without reasonable ground of belief in the directors that the statement was true. For the purposes of that Act, I think that "an untrue statement" means a statement in fact untrue, not a statement in the belief of the directors untrue. The real facts, if I am right in the conclusion at which I have arrived, are that all the several contracts which I have mentioned were subsisting contracts, and that the company was a party to them; but as regards the contract for cancellation of the contract of September 21, it does not seem to me possible to say that that was not a contract in the sense of being a subsisting contract, and the prospectus said that that contract did not exist. That statement was untrue in point of fact. Then this also was untrue in point of fact: the agreement of September 21 had created an obligation to repay the deposit

of 14,250*l.*, and that was never disclosed. That part of the agreement at any rate remained, and that was a contract, and it was untrue to say that the company was not a party to a contract for the repayment of the 14,250*l.* So that there were, I think, statements which were in fact untrue.

Then had the directors reason to believe, and did they believe, that those statements were true? Now, as regards Mr. Shepheard, I do not for a moment impute as against him that he was stating anything which was untrue in the sense that he believed that it was untrue. I acquit him altogether of any fraudulent intent or improper action in the matter, but in point of fact he had no reason to believe that the cancellation contract had been put an end to, because it had not. I do not suppose he ever addressed his mind to the point. That is the real answer to it. The contract existed, and he did not think or inquire, I suppose, at all as to whether that was a thing which was in existence or not. He did attempt to protect himself in this way—that he went to counsel, and counsel said the prospectus could be issued as it was, and that, having regard to the rescission of the contract, it would do. But counsel cannot protect directors by telling them that they need not comply with an Act of Parliament if they ought to comply with it. The question is simply one of fact, whether it existed or not; if the contract did exist, then the statute applied. It seems to me, therefore, that under the Directors Liability Act also it is a fraud by reason of the statute.

Then, thirdly, as regards an action for common law deceit. As regards that I acquit Mr. Shepheard altogether. I am sorry to say as regards Mr. Clayton the state of things is this: that he knew of the letter of September 21, that he was at the meeting on October 20, and that he had no knowledge that the agreement of September 21 had been cancelled at all. He relied in point of fact on his solicitor's advice, who told him he need not put it in. The solicitor cannot protect him there. He is a person, it seems to me, who is guilty of making a statement which is untrue, careless whether it be true or not. He is guilty of the fraud or deceit that he affirms that he knows the contract of September 21 is gone when he has no

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knowledge or belief on the subject. That is ground for success in a simple common law action of deceit.

Lastly, as against Mr. Speak. He was chairman of the company, and was the director who shared with Bowden, or was to share with Bowden, the 7500*l.* I have looked at the pleadings to see whether I can find that the plaintiff alleged the existence of that contract between Bowden and Speak as something on which he founded himself in this action. It is not there. But still Mr. Speak certainly does not stand in a position in which he is at any rate any better off than either of his co-defendants. I arrive, therefore, at the conclusion that there has been here established a case under s. 38 of the Companies Act, 1867, and under the Directors Liability Act, 1890.

The next question is this: Did the plaintiff rely upon the prospectus so that he can succeed by reason of the falsity of the statements? It is unintelligible to say that a person relied upon a fact which he was not told, or relied on his not being told a fact, and when you call a man after the event to say whether, if he had known a further particular fact, he would have done something or not, speaking for myself, it is so difficult to say exactly what a few years ago you would have done under different circumstances, that I should regard that evidence as of very little value. Be the man the most honest man possible, it is so easy to be wise after the event, that it is difficult for any man to say what he would have done under circumstances which did not arise. It is too much to expect of him that he should be able to say fairly what he would have done under those altered circumstances. The test I think to be applied is—it has been so stated by Lord Halsbury, and was so stated in *Smith* v. *Chadwick* (1), and will be found in many cases—that if you find that the matter withheld is such as that if disclosed it reasonably would deter or tend to deter an ordinarily prudent investor from applying for the shares, then he is entitled to relief. As to that I will read only one passage from the evidence given by Sir Robert McConnell. He, being called by the defendants, was asked: "Supposing

(1) (1884) 9 App. Cas. 187.

you had been told that the promoter of this company, Bowden, had been promised a commission of 7500*l.* for finding this deposit, and that the chairman of the company was going shares with him in it, would you have had anything to do with the concern?—(*A.*) I would have retired from the board forthwith. (*Q.*) You would not have touched the thing?—(*A.*) Certainly not." I agree that that involves another element—namely, "that the chairman was going shares with him in it"; but, subject to that, Sir Robert McConnell said that if he had known of this 7500*l.* story he would not have touched it. Messrs. Bray and Gaunt, two directors of the Leeds Joint Stock Bank, who attended the meeting of October 10, regarded this as a thing which was wholly wrong. Can I say that this plaintiff, if he had known it, would not have taken the view that Messrs. Bray and Gaunt took, or that Sir Robert McConnell took? It appears to me I am entitled to say for the plaintiff, "This is a thing which it was very material to you to know; what you would have done I cannot tell; but here is a material thing which has not been disclosed to you, and therefore you are entitled to relief."

The result of this is that the plaintiff is entitled to damages as against all the defendants. The measure of damages is well fixed. It is the difference between the price which the plaintiff paid for the thing, and the fair value of the thing at the date at which he got it. But, in determining that fair value, regard is to be had to subsequent events. That was laid down in *Peek* v. *Derry* (1) in the Court of Appeal, and Cotton L.J. says: "Nor do I think he ought to be precluded from taking into account the subsequent events. Although the value of the shares is not to be ascertained at the subsequent period so as to take into account for the benefit of the plaintiff events subsequent which depreciated their value, yet those events, if they shew that the company was originally, with the capital which it had got, a company which was worthless, may, in my opinion, be taken into account as evidence of what was the value of the shares immediately after they were allotted to the plaintiff." The question is not

(1) 37 Ch. D. 592.

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answered by finding what was the market value of the shares at the date of allotment. It may be that the market value was raised by the very misrepresentation of which the plaintiff complains. You have to see what was their fair value at that time, and that has to be answered as best you may. It is a difficult question to answer, no doubt.

Is there evidence here of some damage? I think there is. I find it in this. In the first place, the Leeds Bank shareholders got 9*l.* 10*s.* per share—the purchase price—and the market value of the Leeds Bank shares at that date was 8*l.* 10*s.* or thereabouts; in other words, there was being paid something to the Leeds Bank shareholders in excess of the value of the assets as measured by the value of the Leeds Bank shares in the market. It does not necessarily determine the value of the assets, but it is a guide. So this bank was acquiring the Leeds Bank on the terms of paying something more than the Leeds bank considered it to be worth while it was in their possession. Then there is this fact—that, under the agreement of May 9, 20,000*l.* was given away to Bowden, and has gone away to Bowden. That is 20,000*l.* gone for which there is nothing obtained, unless it be obtained in the shape of goodwill. There is this further evidence—that these shares, upon which 2*l.* 10*s.* were paid, people were ready to buy at about 2*l.* 5*s.* or 2*l.* 6*s.* per share; so it appears to me there is some evidence of damage, and I think the plaintiff is entitled to an inquiry as to damages. Therefore I declare that the prospectus must be deemed fraudulent, as regards the plaintiff, on the part of the defendants, and I direct an inquiry as to damages which the plaintiff has sustained by being induced to take the shares by reason of the fraud. The defendants must pay the costs of the action.

F. E.

C. A.

All three defendants appealed separately.

The appeals were heard on January 23, 24, 26, and 27, 1903.

Haldane, K.C., and *F. Cassel*, for the defendants Shepheard and Clayton on their appeals. The learned judge has found these defendants liable in damages for non-disclosure under

s. 38 of the Companies Act, 1867, and s. 3 of the Directors Liability Act, 1890, and as regards Shepheard, his Lordship, while acquitting him of any fraudulent intent or improper action in the matter, held that he could not shelter himself under the legal advice that it was unnecessary for the contracts to be referred to in the prospectus if in point of fact the Act required that they should be referred to.

It is submitted (1.) that the alleged omissions from the prospectus were not material; (2.) that the plaintiff did not rely on the statement in the prospectus that the contracts there referred to were the only contracts; and (3.) that the plaintiff has not shewn that he has sustained any damage.

As to (1.), it is said that s. 38 requires that every contract shall be mentioned in the prospectus, and that the defendants are not entitled to say they believed that the section meant only such contracts as were material. Now this is not a case in which the maxim "Ignorantia legis non excusat" applies. That maxim does not apply to questions of the construction of documents, but only to questions of general law: *Cooper* v. *Phibbs* (1); *Earl Beauchamp* v. *Winn*. (2) Upon the construction and effect of these various contracts or documents, and upon the question whether they, or any of them, ought to be mentioned in the prospectus, the defendants took the advice of counsel. When a director seeks and obtains the best legal advice he can, and is advised that he is under no legal obligation to disclose certain matter, he is subject to no liability under s. 38. So also when, with knowledge of the circumstances, he arrives at the honest belief that a certain document is not in fact a contract, and therefore need not be disclosed, he is not rendered liable. Sect. 38 does not mean literally that every contract is to be disclosed, for it is well settled that only material contracts need to be disclosed: *Sullivan* v. *Mitcalfe*. (3) The true test of materiality is, as was put by Buckley J., would the plaintiff have been reasonably deterred from applying for shares if he had been told that Bowden was to receive a proper remuneration? The commission was to be

(1) L. R. 2 H. L. 149, 170. (2) L. R. 6 H. L. 223.
(3) 5 C. P. D. 455.

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paid to him, not only for advancing the deposit, but also for his services in introducing the business to the London and Northern Bank, and it amounted only to 5 per cent. on the purchase-money. The arrangement or contract of September 21, 1898, under which he was to have 7500*l.*, was in operation for a few days only, and then it was rescinded by the resolution of October 10, 1898. It cannot be material that an applicant for shares should know all the history of the negotiations for starting the company in business. Sect. 38 points only to contracts existing at the date of the prospectus; it does not apply to a rescinded contract, or to the contract by which it was rescinded. The resolution of October 10 did not in itself amount to a legal contract upon which an action would lie, for it operated merely as an honorary obligation on the directors to pay Bowden what they thought fit for his services, and not to impose on them any legal liability to pay him a quantum meruit: *Taylor* v. *Brewer* (1), *Bryant* v. *Flight* (2), per Parke B., whose opinion, though overruled by the majority of the Court in that case, was approved of in *Roberts* v. *Smith* (3); *Loftus* v. *Roberts*. (4) Again, it is only the dates and the names of the parties to a contract which are to be stated. If all the facts had been stated, it cannot be supposed that the plaintiff would have been deterred from applying for shares. The plaintiff must be taken to have known that there was to be a deposit, and it was not likely that any one would advance the deposit without being remunerated for so doing.

As to (2.), the evidence does not go to prove that the plaintiff relied on the statement in the prospectus that the contracts referred to were the only contracts. To entitle him to damages, he must shew that he relied upon the absence of any such contracts as he now alleges.

As to (3.), no substantial damage has been proved. The plaintiff himself really gave no evidence of damage; whatever evidence there is was elicited from the defendants' witnesses.

As to the words "knowingly issuing" in sect. 38, there

(1) 1 M. & S. 290; 21 R. R. 831.
(2) 5 M. & W. 114.
(3) 4 H. & N. 315, 321.
(4) 18 Times L. R. 532.

cannot be knowledge of a contract in the existence of which the director does not believe. If he does not believe that there is a contract, it would be fraudulent to state that there is one. In other words, if s. 38 applied in such a case, the director would be guilty of a statutory fraud unless he committed an actual fraud. We submit that there was not on the part of these appellants, and especially in the case of Shepheard, such knowledge or such want of reasonable care as to exclude them from the benefit of the word "knowingly" in s. 38, or of the exemption to which, under s. 3, sub-s. 1, of the Directors Liability Act, 1890, a director is entitled if he has "reasonable ground to believe" the truth of a statement in the prospectus.

Astbury, K.C., and *J. Roskill*, for the plaintiff. It is not disputed that when a contract absolutely rescinds a prior contract s. 38 does not apply. And no doubt s. 38 applies only to contracts which are material to the promotion of the company or to the business of the company. But a contract which rescinds a prior contract with a modification is material. The rescission in the present case left something material standing; it did not wipe out the original contract. After the rescission Bowden still thought he was to have 7500*l.*, and he brought an action for it. Though some of the directors thought that 7500*l.* would be an excessive remuneration, others thought it would not; but none of them thought that Bowden ought not to be remunerated at all.

As to damages, it is submitted that the plaintiff has proved primâ facie damages. The bank was wound up in a little more than a year. The prospectus was issued on October 20, 1898, and there is evidence that in January, 1899, people were willing to buy the shares at 2*l.* 5*s.* They started business in a critical position; the assets of the Leeds Bank were not worth what was paid for them.

As to the meaning of the words "knowingly issuing," it is only necessary that the man should know the statements in the prospectus and the real facts. The meaning is "intentionally issuing a prospectus without inserting the contracts which are required by s. 38 to be specified, although they are

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omitted under the bonâ fide belief that it is unnecessary to specify them": *Twycross* v. *Grant.* (1) Here the defendants chose to rely upon the advice of counsel that these contracts need not be mentioned in the prospectus. It may never have occurred to any one that the contract of rescission was a contract within s. 38; but still the defendants knew all the facts: no advice can get rid of the facts. They may have bonâ fide thought that the agreement for an honourable understanding was not a contract; but they never considered whether the rescission was a contract. The mere borrowing of money to pay the deposit may not have been material, but the nature of the borrowing was very material.

As to s. 3, sub-s. 1, of the Directors Liability Act, 1890, the defendants had no reasonable ground for believing that the statement in the prospectus was true.

[COLLINS M.R. Under that section the damage must be connected with the misrepresentation, but that is not so under s. 38 of the Companies Act, 1867.]

It may be admitted that if s. 38 does not apply, the plaintiff has no case under the Directors Liability Act. The arrangement of October 10 was either a contract, or it was an accord without satisfaction, which does not affect the right of action for the original claim: *Bayley* v. *Homan* (2); Leake on Contracts, 4th ed. p. 622. It was intended that Bowden should get something, and the object of omitting the contract from the prospectus was to conceal the fact that the credit of the company was so bad that they could not raise the amount of the deposit in the ordinary way.

Haldane, K.C., in reply. If the advice of counsel was not a "reasonable ground" within s. 3 of the Directors Liability Act, 1890, for believing that the statement in the prospectus was true, what could be a "reasonable ground"?

As to s. 38 of the Companies Act, 1867, the construction given to it by Thesiger L.J. in *Sullivan* v. *Mitcalfe* (3) has never been doubted. Actions under this section differ from a common law action of deceit such as *Arnison* v. *Smith.* (4)

(1) 2 C. P. D. 469.
(2) 3 Bing. N. C. 915; 43 R. R. 854.
(3) 5 C. P. D. 460.
(4) 41 Ch. D. 348.

The contract must be material to this extent—that a jury would find that the plaintiff would not have taken the shares if the contract had been disclosed. Here the liability originally constituted to pay Bowden 7500*l.* was at an end, whether anything else was or was not substituted for it. The section cannot have the wide meaning now sought to be given to it. As Lord Coleridge C.J. said in *Twycross* v. *Grant* (1), some limitation must be put upon the words "any contract," and I submit that the line must be drawn at a contract that is in a sense material.

Bankes, K.C., and *O. L. Clare*, for the defendant Speak on his appeal. The only fact distinguishing the case of the defendant Speak from that of the other two defendants is his agreement with Bowden to share the bonus; but it cannot be contended on the part of the plaintiff that that fact makes any difference in the case of Speak, the simple question being whether or not a particular contract ought to have been disclosed. Was the contract which was embodied in the resolution of October 10, 1898, assuming it amounted to a contract, material or not? That is the real question. Supposing it had been set out in the prospectus, it would have had no effect upon an intending investor except to attract him, for it purported to cancel a previous contract for payment of a large bonus to the promoter of the company. The omission from the prospectus of a contract likely to attract cannot be "deemed to be fraudulent" within s. 38. The section must be confined (1.) to material contracts, and (2.) to contracts that are likely to deter.

[COLLINS M.R. It is not left to the directors to speculate whether a particular contract will attract or deter.]

In *Sullivan* v. *Mitcalfe* (2) Thesiger L.J. says that the section means that every contract material to be made known to persons invited to subscribe for shares must be disclosed—that is, every contract that is material to deter, and which, if it had been disclosed, would have deterred an intending investor from taking shares. What the section means is that you shall not take advantage of a man, or leave him in a worse position, by

(1) 2 C. P. D. 469, 482–3. (2) 5 C. P. D. 455, 460–1.

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omitting a particular contract from the prospectus. The mere fact of not making the prospectus as attractive as it might have been—the omission to say all that might have been said in favour of the company—does not make the prospectus "fraudulent." Therefore we submit that a contract is only "material" if it operates to deter. As to the contract of September 21, assuming it should be held to have been rescinded, the section cannot apply to a contract which has been put an end to.

Again, the plaintiff must shew that he has been damnified; and we submit that, if the contract of October 10 had been stated in the prospectus, he could not possibly have been damnified. Where a man is coming for relief under this section he must shew how he was likely to be affected by the non-disclosure of a contract: *Baty* v. *Keswick* (1); *Cackett* v. *Keswick*. (2)

Astbury, *K.C.*, and *J. Roskill*, for the plaintiff. In *Baty* v. *Keswick* (1) there was no prospectus actually issued at all: the plaintiff, who was an underwriter of shares, had only seen a proof of it; and therefore it was held that the case was not within s. 38. *Cackett* v. *Keswick* (2) is an authority in our favour.

As to the effect of the resolution of October 10, 1898, it is not correct to say that it cancelled the previous contract of September 21. It only cancelled it so far as the fixed sum of 7500*l.* was concerned, but it still left Bowden to his right of remuneration, and possibly at a higher figure than 7500*l.*

Then, first, it is said that a contract, to come within s. 38, must be a contract likely to deter an intending investor. It has been held that the word "contract" in the section must be limited to a contract that is "material." Now a "material contract" is a contract which it is necessary for an intending investor to see in order to enable him to form a judgment one way or the other. We submit it is impossible to take Thesiger L.J.'s observations in *Sullivan* v. *Mitcalfe* (3) as meaning that a contract within the section must be "material" in the sense of being "deterrent." It is not for the directors to

(1) (1901) 50 W. R. 14. (2) [1902] 2 Ch. 456, 464.
(3) 5 C. P. D. 455, 460–1.

consider whether a particular contract will deter or not; an intending investor is entitled to form his own judgment.

Secondly, it is said that after the resolution of October 10 Bowden had a legal right to remuneration. The question is, What was the effect of the resolution—did it cancel the previous contract in toto, or only sub modo? We submit that it did not cancel the previous contract in toto, but only altered the mode of remuneration from a fixed sum to a quantum meruit. By the resolution the directors recognised the performance by Bowden of services undertaken at their request. It is impossible, therefore, to say he was not entitled to a quantum meruit; and if so, it was an agreement for his remuneration which could be enforced by him. If asked to do something extraneous to his office as promoter, he was certainly entitled to remuneration, just as in any ordinary case of contracting parties, for his fiduciary character extended only to his position as promoter: outside that he was entitled to be remunerated for services rendered, especially considering that he was subject to this great risk of the forfeiture of the deposit of 14,250*l*. The effect, then, of the resolution of October 10 was to relegate Bowden to his common law position as if there had been no contract of September 21—that is, it gave him a quantum meruit right which that contract, while in existence, excluded. That is the meaning attributed to the resolution by Buckley J., and is, we submit, the right one.

Thirdly, it is said that s. 38 does not apply to a contract which has been rescinded. If the contract of September 21 had been rescinded in toto, we do not say that it ought to have been in the prospectus. But, as we have already contended, it was not rescinded in toto, for the resolution of October 10 merely substituted a quantum meruit for the 7500*l*., the effect of the resolution being to enable Bowden to recover 7500*l*., or even more, as a quantum meruit, if he could justify it. It is impossible to sever the resolution from the letter: they really formed one contract, the second document being merely a modification of the first.

Fourthly, the defendants cannot be allowed to plead ignorance of the law. They certainly knew all the facts, and "knowingly"

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in s. 38 means knowing the facts, not the law: *Twycross* v. *Grant*. (1) We do not say that the defendants made the omission fraudulently, but they made it with their eyes open.

Bankes, K.C., in reply.

COLLINS M.R. The question in this case arises upon the omission from the prospectus of certain contracts which the plaintiff says ought, under s. 38 of the Companies Act, 1867, to have been stated in the prospectus; and there is also a claim under the Directors Liability Act, 1890, on the ground that the statement in the prospectus negativing the existence of any contracts other than those disclosed is an "untrue statement" giving a right of action under the terms of that Act. The learned judge has found for the plaintiff both upon s. 38 of the Companies Act, 1867, and also upon the cause of action alleged under the Directors Liability Act, 1890. The same facts raise both contentions. [His Lordship then stated the facts down to and inclusive of the letter of September 21, 1898, and continued:—]

Now stopping there it seems to me, and indeed it was scarcely disputed by counsel, that there was a complete legal bargain binding on the directors to pay, in certain events, this commission to Bowden; and there can be no question that at this date, September 21, 1898, that was a contract which was material, and one which the company themselves deemed to be material, because they mentioned it in the draft prospectus which they first proposed to issue to the public. [His Lordship then stated the facts relating to the meeting of October 10, 1898, the passing of the resolution of that date, and the preparation of the prospectus in its original form and as subsequently altered and issued to the public. His Lordship then proceeded:—]

It is this prospectus as finally issued that gives rise to the contention in this case. The plaintiff says the original contract of September 21 was modified, not cancelled, by the subsequent resolution. He says that all that really took place in the shape of a contract between the company and its pro-

(1) 2 C. P. D. 469, 488-9, 542.

moter cannot be fully and sufficiently disclosed without stating, not merely the original contract which was partly altered, but also the subsequent agreement embodied in the resolution which, while partly altering the previous contract, also substituted something else; and he says that the contention of the defendants—that there was a complete cancellation of the original contract by the subsequent contract, and that, therefore, the one having wiped out the other, and neither having any separate existence itself, neither of them needed to appear in the prospectus—cannot be maintained. The plaintiff further says that in truth and in fact, if the whole circumstances are looked into, it will be found there is not only the one contract, but two, or even three, involved in the discussion. First of all there is the original contract of September 21 formally adopted by the company, and which, as the plaintiff contends, was not fully and finally rescinded, but only altered, leaving some of it remaining, and something else being added afterwards. That original contract, the plaintiff says, could not be rescinded except by the agreement of both parties to it, and if it was, as the defendants contend, rescinded by the resolution of October 10, that rescission, made with the agreement of both parties, was itself a contract, and a contract which was material to be known by intending investors, and therefore ought to have been stated in the prospectus, for it assumes the liability of the company to the promoter for payment to him, not indeed of the specific amount contracted for in the original contract of September 21, but of a sum by way of "proper remuneration for commission on introducing the business of the Leeds Joint Stock Bank, Limited, and raising the necessary deposit."

Now what is the true effect of the resolution of October 10? It seems to me that it was not intended by the parties to get rid of any part of the letter of September 21, or of the contract evidenced by that letter, except as to the amount of remuneration, and does not in terms do so. Nobody has contended that it touched the right of the company, as against Mr. Bowden, to throw upon him the risk of the forfeiture of the deposit. It leaves, and was intended to leave, the arrangement

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as to the payment of the deposit and the rights of the parties thereon intact; and therefore that part of the contract of September 21, so far as it deals with that arrangement, was not annulled by the subsequent resolution of October 10. But furthermore, there is embodied in that resolution a contract—for unquestionably it is a contract—purporting to annul the previous contract, and if it is a material contract it is one that ought to be set out in the prospectus.

Now is it material? It cannot be said, it seems to me, to be a mere wiping out in its entirety of the antecedent contract. It purports, in my judgment, to alter and not to rescind. It does, no doubt, get rid of the obligation to pay the fixed sum of 7500*l.*, and, as I interpret it—though I do not know that for the purpose of ascertaining the rights of the parties arising out of the omission it is necessary to decide the point—this resolution, first of all, not only annuls the antecedent right to receive a fixed sum, but recognises the subsisting right to receive some sum and undertakes, while treating that right as a right to receive proper remuneration, that it shall be honourably met at a future meeting of the directors. The resolution seems to me to assert and adopt a contract to pay proper remuneration, and not to constitute a mere engagement in honour, giving the directors the right to pay nothing if so advised: it admits an obligation to pay something, and merely leaves the amount to be determined. Whether it is of itself a contract enforceable in law to pay something or not, it seems to me that it is certainly one of the terms upon which this contract of rescission was carried out, and that it would be impossible to state the contract of rescission without stating this as one of the terms, which, putting it at the lowest, would leave an honourable understanding subsisting between the company and the promoter for the payment to him of some remuneration.

Now is that a material contract to set out? If it embraces in the second part of the resolution a contract binding in law to pay a quantum meruit, I cannot myself see how it can be said not to be material. It is a contract between the company and its promoter, which may possibly result in his getting the same sum as was originally stipulated for in the previous

written agreement, but which must undoubtedly result in some payment being made to him.

Now assuming that to be a binding obligation, is it material or not—and if not, why not? It is a contract by the company to pay its promoter. Evidence has been called to our attention on this question of materiality. From that evidence it appears that it was the subsistence of the contract of September 21, to pay the promoter the bonus of 7500*l.*, that caused the directors of the Leeds Joint Stock Bank, who had been asked to join the board, to take exception to the contract as one that ought not to have been made; and it was in consequence of that that steps were taken to get rid of a contract which, on the face of it, had proved to be not an inducement but a deterrent to persons who were asked to come into the adventure. Now, if the directors of the company had completely got rid of the contract of September 21, and had wiped it out of existence, all might have been well; but in attempting to get rid of it there was substituted another binding obligation to pay a sum which might amount to quite as much as the sum originally fixed, but which must, in all probability, amount to, at all events, a substantial sum, considering the very great risk that had been undertaken by the promoter. That was the point that was mainly argued before us.

If that substituted obligation is a binding contract, it seems to me clear—in fact, it was hardly disputed—that it is a contract which ought to have been set out in the prospectus. But it was strenuously urged by Mr. Haldane that it does not amount to a binding contract, but only to an undertaking in honour. Even if that be the true view, I am of opinion that the contract of rescission in this case cannot be dissevered from the original contract which it purported to rescind, and that, in order to understand the real nature of the transaction which resulted in creating the ultimate contractual rights between the parties, it is necessary that the whole of the arrangements should be stated, since the new and ultimate arrangement embraced some of the terms of the old, so that it is impossible to say that the new simply effaced the old. Something of the old survived, and whether the resolution

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is to be regarded as a contract of rescission, or whether it is to be regarded as not a contract of rescission alone, but as a superadded contract giving legal rights, in either case it ought to be disclosed. The learned judge has found that both the letter of September 21 and the resolution of October 10 were contracts and material contracts, and has held that they ought therefore to have been disclosed; and in my opinion he has arrived at a right conclusion.

There can be no doubt, it seems to me, that the very peculiar contract whereby the promoter was substituted for the buyers in finding the deposit, and finding it under such conditions as to take upon himself, to the exclusion of the company and its directors, the entire risk of their ultimately failing to carry out the contract for purchase which they had adopted, was such a very remarkable arrangement that it could not be said not to be material. That part of the arrangement continued to subsist after the supposed rescission, and the only way the directors could avoid stating it in the prospectus was by treating the contract for remuneration as being rescinded, not only as to the sum originally fixed thereby, but also as to all the other matters comprised therein, so that it needed not to appear upon the prospectus at all. Therefore, I think that the different steps in this transaction which resulted in the ultimate arrangement were steps which, taking as they did, for the reasons I have given, the form of contracts, ought to have appeared on the prospectus.

Now, all the defendants are in the same position, because, though there is a distinguishing fact in the case of the defendant Speak, it is not one which the plaintiff has put into his claim or on which he seeks to rely in argument; and, therefore, for this purpose, I treat all the defendants as being in the same position. It is said on their part, "What the defendants did here they did on the advice of counsel; it was a difficult question to decide as to whether there was to be evolved out of the resolution of October 10 a fresh contract. The form of the resolution raised a question upon which even judges have been divided in opinion, and therefore the Court cannot expect the defendants, who are laymen, to form a

judgment as to whether that resolution did make a contract, and treat them as persons who ought to have known that there was a contract, and therefore as persons who knowingly issued a prospectus without disclosing that contract." Shortly put, that is their contention, and it involves one or two assertions which I do not think the evidence will support. To begin with, it involves this assertion—that the defendants did not know of any contract outside the contract originally made on September 21, and rescinded by a resolution which, according to their contention, in effecting the rescission left nothing of the rescinded contract remaining. Now the first step upon that is to ask this question: Were they aware or not that the rescission itself involved a contract? That question was put very distinctly to Mr. Shepheard; and Mr. Shepheard, who gave his evidence, as all admitted, with the most absolute sincerity and with a desire to state the whole truth, frankly admitted that he knew that the rescission did involve a contract of rescission. Then it was put by Mr. Astbury, and the learned judge has adopted his view: "Here you knew of the contract, and you have not put it in. How can you excuse that?" The suggestion to that is: "I relied on the advice of counsel." It seems to me that if Mr. Shepheard knew of the existence of a contract, and relied on the advice of counsel as to whether he should put it in the prospectus or not, that would be no excuse. But, as a matter of fact, the point upon which counsel was actually consulted had no relation, it appears, to the question of whether the contract of rescission should be put in or not. What counsel was consulted upon was whether it was necessary that the original contract should appear, and his view was that it was not, inasmuch as it had been rescinded. That is Mr. Shepheard's own statement in evidence. So that, as we do not know exactly what question was put to counsel, I do not think it can be fair to assume against him that he advised more than Mr. Shepheard says he advised, the point he was really considering being whether the directors were bound to disclose this contract of September 21, which for many reasons it was undesirable to disclose. But it seems to me (in fact it was hardly disputed in argument) that if the defendants

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knew of the existence of that contract, and did not put it in because counsel told them it was not necessary to do so, that would be no defence in point of law, if in point of fact it was a contract that should have been put in. The only ground on which it could be suggested that it should not be put in was that it was not material, and that is the question which has been argued before us.

It has been suggested that, unless it can be shewn clearly that the plaintiff would have been deterred from buying the shares in this company had he known of the existence of this contract, he cannot succeed. That, it seems to me, is putting the case considerably higher against the plaintiff than the authorities warrant. To begin with, to come back simply to the words of the section, what does the section itself provide? "Every prospectus . . . . shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus . . . . whether subject to adoption by the directors of the company, or otherwise; and any prospectus . . . . not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking any shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." Therefore the standard is: "Did he knowingly issue the same?"—that means, intentionally put out a prospectus not including a contract of the existence of which he was aware,—I pointed out, in dealing with the contract of rescission, that Mr. Shepheard was aware of it,—and the plaintiff must have taken his shares on the faith of the prospectus. I will refer to the judgment of Baggallay L.J. in *Sullivan* v. *Mitcalfe* (1) as stating, as it seems to me quite accurately, and also in accordance with subsequent decisions, what the real meaning of that enactment is, so far as materiality to the plaintiff is concerned. He says this (2): "Why should provision be made for its being specified in every prospectus or notice issued for this purpose"—that is, the purpose of inviting

(1) 5 C. P. D. 455. (2) 5 C. P. D. 464.

persons to subscribe for shares—"whilst no provision is made for its being specified in any prospectus or notice issued for any other purpose, unless it was the intention of the Legislature to afford some protection to or to confer some benefit upon persons who might be likely to respond to the invitations so given to them? And if such was the intention of the Legislature it is difficult to suggest any other class of contracts as being within its contemplation than such as, if made known to a person reading the prospectus or notice, would be likely to influence him in determining whether he would or would not become a shareholder in the projected company."

Mr. Astbury has pointed out, and the learned judge also in a passage which I will presently read from his judgment, that it is really demanding impossibilities of the Court to ask it to find, as a fact, that a person would have been influenced in a particular way if a contract which he had never seen, and of which he knew nothing, had been disclosed at the time. That is a problem too complicated for solution by any one. What the attitude of the intending investor would have been had the contract been known to him becomes a question of mere speculation; but it seems to me that he is clearly entitled to this—to have every element material for enabling him to form a judgment, as to whether he will or will not subscribe for shares, fairly put before him; and as regards the particular case of contract, the statute has made a specific enactment treating the prospectus which does not disclose material contracts as fraudulent, and giving remedies in such a case upon the basis of the prospectus being fraudulent.

Upon this point I will also read a passage, from the judgment of Lord Coleridge, in *Twycross* v. *Grant*. (1) He says there: "An applicant for shares in a company is in a totally different position"—he has been speaking of an ordinary vendor and purchaser. "His money becomes part of the capital of the company; and to him it is all important to know what sort of persons are to have the control of his money when he has paid it, and how that money is to be applied, whether upon the enterprise itself or in remunerating, perhaps in lavish

(1) 2 C. P. D. 469, 483.

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extravagance, those who have brought the company into existence."

Buckley J. in his judgment in the present case states his view of the law upon the point in a manner which seems to me to be absolutely sound. [His Lordship then read from the judgment the passage (1) commencing, "The next question is this: Did the plaintiff rely upon the prospectus," and ending, "then he is entitled to relief." His Lordship then continued:—] Then the learned judge goes on to refer to the evidence of one of the witnesses in the present case, a director of the company, which seems to shew that, if he had been told that the promoter had been promised a commission of 7500*l.*, that would have deterred him from having anything whatever to do with the company. I cannot doubt in my own mind that this contract of September 21 and the circumstances under which it was sought to be rescinded are certainly such as would, in my judgment, be material factors if placed before any one who had any thought of investing in the company. I need not enlarge upon that further, because it is a question of fact from which an inference of fact has to be drawn, and the learned judge has drawn the inference. He has stated his view of the law in language to which I can take no exception; he has seen the witnesses, and from seeing them he has arrived at the conclusion that to people such as they it would be material that they should know of the existence of these contracts; and that being an issue of fact, and the learned judge having found that as a fact, and having found it on grounds which I cannot question, it seems to me that that matter must be treated as out of controversy. In my judgment it certainly was most material that a would-be investor should have known the real facts as to these contracts.

Now I come to the last point which was made, and that is that there are no damages shewn in this case. One passage in the learned judge's judgment was referred to as shewing that he based his view that there were damages on grounds which the defendants contend cannot support it. But it seems to me that some injustice has been done to the learned judge by those

(1) Ante, p. 604.

arguments, for he begins by referring to the fact that this company has gone into liquidation; then he says that although the time at which the value is to be ascertained is not the time when the company goes into liquidation, but the time when the shares were taken, yet you must look back, having regard to subsequent events, to the earlier state of the company, and form a judgment whether, at the time these shares were taken, the assets of the company corresponded in value to the money paid. He begins his statement as to damages thus: "The measure of damages is well fixed. It is the difference between the price which the plaintiff paid for the thing, and the fair value of the thing at the date at which he got it. But, in determining that fair value, regard is to be had to subsequent events." Then he refers to what Cotton L.J. says in the well-known case of *Peek* v. *Derry* (1), and then he goes on to deal with the specific heads of damage which had been proved before him. Without going into that in detail, I think there was quite sufficient before the learned judge to justify him in coming to the conclusion that the plaintiff had suffered substantial damage. If that be so, the essential conditions of the plaintiff's right have been fulfilled.

I have dealt with the case so far only under the 38th section of the Companies Act, 1867. It seems to me unnecessary to consider the case under the Directors Liability Act, 1890. I do not know that any material distinction can be made for the present purpose between the two Acts, but it is quite enough to say that, in my judgment, the plaintiff's cause of action on s. 38 is established. I think he has shewn that notwithstanding this attempt to cancel the contract of September 21, that contract, as to some part of it, was still left subsisting; and it seems to me that the machinery by which it was sought to amend it involved the making of one or more contracts which, in the circumstances, were material, which ought to have been stated in the prospectus, and which did not appear in the prospectus. Further, I think it has been sufficiently shewn that the plaintiff is entitled to aver that these contracts were material, and to claim damages on the footing that they were,

(1) 37 Ch. D. 592.

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and the claim for damages is, I think, also established for the reasons I have given.

I am of opinion that these appeals must be dismissed, and with costs.

ROMER L.J. After what has been said by the learned judge in the Court below and by the Master of the Rolls, I may be comparatively brief.

I need only refer to the case of Mr. Shepheard, because it is clear that, if he cannot succeed on his appeal, the other appellants cannot succeed on theirs. Now, I have also reluctantly come to the conclusion that Mr. Shepheard's appeal must be dismissed. I say "reluctantly," because I cannot help seeing that, in his case, s. 38 of the Act operates very harshly. I have, speaking for myself, seeing how harshly it operates in his case, to discover, if I can legally and properly, some way in which he might be able to escape from the exigencies of that statute, and I am sorry to find no way by which I can, satisfactorily to myself, say that the section does not operate so as to hit him.

I will first consider how matters stood after the board meeting of October 1, 1898. There was then, it appears to me, clearly a contract binding Mr. Bowden and the company—a contract of a very material kind. The promoter, Bowden, had found a deposit for the purpose of the company's contract with the Leeds Joint Stock Bank. Now he certainly was not bound by any of his duties as promoter to have found that deposit; still less, having found it for the purposes of the company, was he bound, if the company indorsed what he had done, to do anything more than say, "If you take the benefit of this deposit you must also take the obligation to repay." From the terms of the contract or note of September 21 it would appear that the company took upon itself, had that contract been adopted without alteration, the liability to repay the deposit, on the allotment or on October 30; but at this board meeting of October 1 the company appear to have called upon Mr. Bowden to take upon himself a very special risk. The company wanted to take up the position that they were

not liable for the repayment of this deposit, even if forfeited. They were only to be liable for the repayment of this deposit if the directors went to allotment and when the purchase of the Leeds Joint Stock Bank was completed; in other words, when all the risk was ended. So that they wanted to throw upon Mr. Bowden the whole risk attendant upon the finding of this deposit, although they were prepared to take the benefit of what he had done in respect of the contract with the Leeds Bank in the way of finding that deposit. Not unnaturally there had to be some counter-obligation incurred by the company in order to call upon Mr. Bowden to take upon himself such a risk, and one finds that mentioned in the resolution passed on October 1, being a resolution that they not only agreed to repay the deposit in the events I have mentioned, but also to pay a bonus of 7500*l*. Mr. Bowden assented to that resolution. So that there was a binding contract come to, a material contract, an important contract, to my mind, from any point of view. That resolution was confirmed at the meeting of October 5, though I do not know that it needed any confirmation.

I now come to the board meeting of October 10, and I will state shortly the conclusion at which I have arrived as to what the result of that meeting was. The meeting was held because two directors of the Leeds Joint Stock Bank, who were to join the board, were of opinion that, under the circumstances, the 7500*l*. bonus which had to be paid was excessive. Those two directors appear to have thought, in the first place, that a much less bonus would be properly payable; and ultimately, as far as I can understand the suggestion, possibly also they came to the conclusion that, under the circumstances, no bonus ought to be paid. On the other hand, the directors of the company thought that, under the circumstances, the bonus was not excessive, and was a proper amount to be paid. A discussion ensued; a resolution was arrived at; and, to my mind, the result is shewn by the resolution that was entered in the board minutes of October 10. I prefer those board minutes myself to the recollection, given long afterwards and in the stress of this trial, of the different gentlemen who had been

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present at that board meeting, and were speaking only from memory. I have no doubt myself that that resolution does truly state in substance the result of the meeting; and I prefer it to the subsequent ambiguous letter of the 18th, which was signed by Mr. Craig, and written, it appears, at the suggestion of counsel who had been consulted. I need not consider why that ambiguous letter was drawn up and considered, when the resolution was there and spoke for itself. I say I prefer the resolution and not the letter, because I find that this resolution of the 10th was subsequently read and confirmed at the meeting of the 20th, and that, too, after the letter of the 18th had been signed, and at the meeting of the 20th Mr. Shepheard was present, as he had been on the 10th, and Mr. Bowden was also present.

Now, on that resolution of October 10, which was acquiesced in by Mr. Bowden on the assurance that was given to him, as appears on the face of the resolution, I cannot myself have a doubt but that a contract was then come to, and a contract of a most substantial and material kind. It is a contract to rescind in part what I call the prior contract come to on October 1. It rescinded it so far as concerns the amount of the bonus, but it left standing the rest of the contract of October 1—the contract which freed the company from the risk of the deposit, and which threw that risk entirely on Mr. Bowden. I think that this resolution of the 10th further bound the company to carry out its assurance, and at the proper time honourably and properly to meet, as it says, the right, under the circumstances, of Mr. Bowden to be remunerated for introducing the business of the Leeds Joint Stock Bank and raising the deposit, and running the risk he had run. The words "running the risk" I imply, though they are not stated in the resolution. Under the circumstances existing on October 10, when that resolution was passed and this assurance was given to Mr. Bowden, it is, to my mind, practically impossible to hold that the company were to be at liberty to say that Mr. Bowden had freed it from the obligation of paying the bonus, but retained the obligation with regard to the deposit, and yet for his services in that respect, at any rate,

he was to receive no remuneration. On the contrary, I feel convinced that the resolution means what it says, namely, that though the amount of the bonus was left over for future consideration, his right to receive some proper remuneration was recognised as part of the contract then come to.

That was then, to my mind, a very distinct and important contract, and one which, under s. 38 of the Companies Act, 1867, ought to have been set forth, because, as I have said, it was substantial and material in the view I take of the section; that is to say, it was a contract which, if its terms had been disclosed to an intending subscriber looking at the prospectus, might have influenced him, and might have induced him not to subscribe for shares.

It was said by counsel on behalf of certain of the appellants that it was wholly immaterial to set forth the contract come to on October 10, because after all it only came to this—that it was a contract to remunerate the promoter, Bowden, properly for his valuable services, and that it could not affect any intending subscriber to know that valuable services were only to be properly remunerated. Assuming that was the only effect of the contract come to on the 10th, I may still point out that an intending subscriber, if he had known all the circumstances, might well—I do not say he would—have considered that if a promoter was going to be paid 20,000*l.* for his services in the promotion of this company, he ought not to be paid this additional remuneration for other services. In other words, this was, to my mind, in any aspect of the case, a material and substantial contract which ought to have been set forth.

Then comes the question whether the defendant Shepheard can excuse himself from the obligations cast upon him by s. 38 by referring to his good faith, and by asserting the belief which he says he has. He says the circumstances were such that they might well have misled him into thinking, as he did think, that no material contract had been come to on the 10th, and that, therefore, he did not "knowingly issue" a fraudulent prospectus within s. 38. For a long time I thought that the view that there was no "knowingly issuing" within the section might be sufficient for him; but, on consideration, I do not see

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my way so to hold. He knew all the circumstances of the case; and I think, on the evidence, that he quite understood the substance of the transaction come to on the 10th. That being so, I cannot think that he is excused from the liability imposed upon him by that section merely because he says in substance that he did not appreciate the legal effect of the circumstances he knew, or did not understand that those circumstances caused such a liability to be cast upon the company as had to be set forth in the prospectus under s. 38. Still less, in my opinion, is he entitled to avail himself of the advice given by counsel as to what should be in the prospectus, whatever that advice may have been, as to which I am not certain.

It follows therefore, in my opinion, that the defendant Shepheard is liable, and that the plaintiff is primâ facie entitled to sue him under s. 38, because, as has been pointed out, the prospectus now becomes fraudulent under that section so far as concerns the plaintiff, and he took shares upon the faith of the prospectus within the meaning of the words used in that section. There is nothing in the evidence which, to my mind, would justify us in holding that the plaintiff is for any special reasons not entitled to avail himself of the provisions of the section, or in holding that what would be to most subscribers a very material disclosure was not so to him. I do not think that the plaintiff in this case, in order to avail himself of the provisions of the section, was bound to prove more than he did. That being so, and as I am also of opinion that the finding of the learned judge with regard to there having been some damage established before him cannot be dissented from, it follows, as I have said, that I am reluctantly compelled to say that the appeal of Mr. Shepheard must fail, and therefore the other appeals must fail also.

COZENS-HARDY L.J. As a general rule it is not desirable for a judge to express regret when he is simply administering that which he believes to be the law, but I cannot in this instance avoid saying it is with great reluctance that I feel bound to concur in the judgment of Buckley J. It is a painful duty to be obliged to treat that as fraudulent which in truth was not

fraudulent, but that is what s. 38 of the Companies Act, 1867, compels us to do.

Then it only remains to consider the application of that section to this action. The matter has been so fully gone into by the Master of the Rolls and Romer L.J., and I so entirely agree with and adopt what they have said, that I shall add only a very few words. One point, and probably the main point, that was made is this: Is the contract created by the resolution of October 10, 1898, a material contract? Speaking for myself, I think it is difficult to imagine that a contract between a company and its promoter, who has already bargained for 20,000*l.* remuneration, can be otherwise than material when it provides for his receiving a further remuneration. Such a contract shews what is the position of the directors as regards the promoter, and moreover it indicates what amount of confidence the directors entertain in the prospects of success of the company. It is a matter which, it seems to me, ought to be taken into consideration by any person contemplating taking shares in the company. It cannot be the correct construction of the section to say that it only applies to contracts which, on the face of them, are so injurious that they are likely to repel an intending investor. It is sufficient, I think, that the contract is one of such a nature that the intending investor may reasonably require to consider it before determining whether he shall or shall not apply for shares in the company. I will not say more about that resolution of October 10 beyond adding this—that the promoter, or the representative of the promoter, which is the same thing, did sue the company upon this very contract, and he obtained, by consent no doubt, but obtained after litigation, judgment for 1500*l.* I do not, therefore, think it can be reasonably contended that there was no obligation upon the company to pay anything to the promoter for the great and very serious risk which he had undertaken with reference to the deposit of 14,250*l.*

Then it is said—and here one has certainly every desire to assist the defendants—that they honestly believed there was no contract existing, or that, if there was any contract, it was one that did not require to be specified in the prospectus.

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Unfortunately, I think that is a contention that cannot prevail. In *Twycross* v. *Grant* (1), which has been so much referred to, the jury found as a fact that mention of certain contracts was omitted from the prospectus from a bonâ fide belief that such mention was unnecessary, and it was argued that that was sufficient to exempt the defendants; but Cockburn C.J. said (2): "'Knowingly issuing' means neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus. Ignorance or mistake of the law cannot be admitted as an excuse for disobeying an Act of Parliament."

Then I ask myself, Is it possible to say that the defendants here did not know of the existence of one or both of these contracts? I think it is impossible to say so. A large part of the first contract, and the most important part of it, was known by the defendants to be still in existence, and the contract by which part of the first was rescinded was also known by them to be in existence.

There is only one other point, and that is as to damage. I confess that on that part of the case I felt at one time considerable difficulty. The plaintiff himself did not call any evidence at all on the subject of damage; but unhappily for the defendants the requisite material was extracted from their own witnesses, and I am not prepared to say that there is not evidence in this case sufficient to prove that substantial damage has been sustained.

In the result I think the judgment of Buckley J. was correct, and the appeals must be dismissed.

Solicitors: *Waterhouse & Co.; Williamson, Hill & Co., for Storey, Willans & Storey, Halifax; Rowcliffes, Rawle & Co., for Cooper & Sons, Manchester.*

(1) 2 C. P. D. 469. (2) 2 C. P. D. 542.

G. I. F. C.

CAPITAL AND COUNTIES BANK, LIMITED *v.* RHODES.

C. A. 1903 *Feb.* 2, 3, 4, 26.

[1901 C. 3123.]

Merger—Lease—Mortgage by Underlease—Subsequent Purchase by Lessee of Freehold Reversion—Contemporaneous Mortgage by Purchaser—Intention to preserve Term—Registered Title to Land—Legal Estate—Unregistered Deed—Registered Charge—Statutory Form—Addition—Grant of Legal Estate to Mortgagee—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 4—*Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *ss.* 22–28, 29, 32, 49, 93–96—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 20—*Land Transfer Rules*, 1898, *rr.* 106, 107, 110.

The transfer of land by a registered disposition takes effect by virtue of an overriding power, not by virtue of any estate in the registered proprietor. After land has been placed upon the register the legal estate in it will pass by an unregistered deed, subject to the risk of the grantee having his title defeated by an exercise of the statutory power of disposition given to the registered proprietor; but the grantee can by an entry on the register protect himself against that risk.

There is nothing in the Land Transfer Acts to prevent the passing of the legal estate in land by an ordinary mortgage deed executed by the owner in fee, whether he is or is not registered as proprietor.

By virtue of rule 107 of the Land Transfer Rules, 1898, a charge upon registered land may, with the approval of the registrar, be registered with the addition to the statutory form of a conveyance of the legal estate in the land to the mortgagee, though he cannot insist upon such an addition being made.

In 1871 a lease was granted of a public-house for a term of ninety-nine years at a rent of 100*l.* per annum. The lease contained a proviso for re-entry on default for twenty-one days in payment of the rent. This lease was assigned to the defendant Rhodes.

In May, 1897, Rhodes, "as beneficial owner," demised the house by way of mortgage to Flower & Sons for the residue of the term, less the last day thereof. No rent was reserved by this deed, and Rhodes covenanted to indemnify Flower & Sons against the original rent. The deed contained provisions making Rhodes in effect a trustee of the last day of the term for the mortgagees or a purchaser from them.

By a deed dated July 27, 1899, the house was conveyed to Rhodes in fee at the price of 3650*l.*, "subject to, but with the benefit of," the lease. To enable him to complete the purchase he arranged to borrow 3000*l.* from the plaintiff bank on the security of the house; and on July 27, 1899,

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a mortgage to the bank was executed immediately after the conveyance to Rhodes, the 3000*l.* being paid by the bank directly to the vendors. The property had been described to the bank as "a freehold ground rent of 100*l.* a year" secured on the house. By the mortgage deed Rhodes conveyed to the bank by way of mortgage the hereditaments comprised in the documents specified in a schedule, as to such of them as were freehold in fee simple, and as to such of them as he was entitled to for any term of years for the residue of such term, except the last day thereof. The schedule comprised the conveyance of July 27 and the other title-deeds relating to the freehold and the counterpart of the lease of 1871, but no other document relating to any leasehold interest.

At this time registration of title to land under the Land Transfer Acts had been made compulsory on sale in the parish in which the house was situate.

On August 28, 1899, Rhodes applied for the registration of himself as proprietor of the house, with a possessory title.

On the same day he executed an instrument charging the house with the payment to the bank of the 3000*l.* and interest.

The charge was in the form No. 39 in the schedule to the Land Transfer Rules, 1898, but there was added to it a grant of the house to the bank in fee, subject to redemption. This charge was also taken in for registration, and on September 18, 1899, the registrar issued a certificate that Rhodes was registered as proprietor of the house with a possessory title, and another certificate that the bank were registered as proprietors of the charge.

In April, 1901, Rhodes executed a deed of arrangement with his creditors to which the bank were not parties. Flower & Sons took possession of the house, and the bank demanded payment of the rent of 100*l.* from them, as well as from the trustee of the deed of April, 1901, but it was not paid.

The bank then brought an action against Rhodes, Flower & Sons, and the trustee of the deed of arrangement, claiming to enforce their security by foreclosure or sale. They claimed also a declaration that the term had not merged in the fee, and that they were entitled to re-enter for non-payment of the rent:—

Held, that, having regard to all the circumstances, it could not have been the intention of the parties that the term should merge in the fee; that before the Judicature Act there would in equity have been no merger; and that, consequently, by virtue of s. 25, sub-s. 4, of the Judicature Act, 1873, there was now no merger at law; that the term was still in existence, and that the bank, if the legal estate in the fee was vested in them, were entitled to enter for default in payment of the rent:

Held, also, by Romer and Cozens-Hardy L.JJ. (Collins M.R. doubting, but not dissenting), that by virtue of the registered charge with the added words the legal estate in the fee had passed to the bank.

Decision of Kekewich J. reversed.

The equitable rule that merger depends upon intention applies to the merger of estates as well as to the merger of charges.

Chambers v. *Kingham*, (1878) 10 Ch. D. 743, and *Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368, approved.

Per Romer and Cozens-Hardy L.JJ.: The register of proprietors under the Land Transfer Acts is not material for the purpose of determining in whom the legal estate in land is vested.

APPEAL from a decision of Kekewich J.

The principal question was whether the term granted by a lease had merged in the reversion in fee, which had been conveyed to the lessee and had been mortgaged by him, he having previously mortgaged the leasehold interest by underlease.

By a lease dated January 31, 1871, a public-house, No. 10, Stafford Street, in the parish of St. George, Hanover Square, was demised to one Shelley for the term of ninety-nine years, from June 24, 1869, at a yearly rent of 100*l.*, payable quarterly on the usual quarter days, and the lease contained a proviso for re-entry on default in payment of the rent for the space of twenty-one days, or in case of the breach of any of the covenants contained in the lease.

Prior to May, 1897, the premises comprised in this lease became vested in the defendant Rhodes for the residue of the term created by the lease.

By a deed dated May 20, 1897, the premises were demised by Rhodes, as beneficial owner, to the defendants, Flower & Sons, Limited, for the residue of the term granted by the lease of 1871, less the last day thereof, by way of mortgage for securing the payment on demand of the sum of 16,700*l.* and interest thereon as therein mentioned. No rent was reserved by this deed, and Rhodes covenanted to indemnify Flower & Sons against the original rents. The deed contained a declaration that the power of sale conferred upon mortgagees by the Conveyancing Act, 1881, should be exercisable by Flower & Sons or their assigns at any time after such demand as aforesaid; and Rhodes appointed the mortgagees and certain persons nominated by them, or the person or persons for the time being entitled to exercise the powers by the indenture now in statement or by law conferred upon mortgagees, his attorneys or attorney, to assign the last day of the term granted by the

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lease of 1871 to any purchaser thereof; and it was declared that if the premises should be sold under the aforesaid power, or if the equity of redemption therein should be foreclosed, Rhodes, or the persons deriving title under him, should stand possessed of the last day of the term (so far as the same might not be assigned to or vest in the purchasers under the power of attorney thereinbefore contained or foreclosed) in trust for the purchaser or persons foreclosing, as the case might be.

On June 7, 1899, the freehold reversion in these premises was, with other property, put up for sale by auction, and was purchased by Rhodes for 3650*l.* Shortly afterwards Rhodes called upon the manager of the Covent Garden branch of the plaintiff bank, where he was a customer, and applied for an advance of 3000*l.* upon the security of the purchased property to enable him to complete the purchase, and he left with the manager the particulars and conditions of sale. The property was described in the particulars as a "freehold ground-rent of 100*l.* per annum most amply secured upon the substantially constructed modern premises, No. 10, Stafford Street . . . . leased for a term of 99 years from the 24th June, 1869, at the low ground-rent of 100*l.* per annum, thus having a valuable reversion in about 69 years to the full rack rental value of the premises or to a very substantial premium for a renewal of the lease." And in the conditions it was stated that the properties were sold "subject to the existing leases thereof respectively, and to all easements and incidents of tenure affecting each lot." Eventually the plaintiffs agreed to advance 3000*l.* on this security. The purchase and the mortgage were carried into effect by two deeds, each dated July 27, 1899. By the first deed the premises comprised in the lease of 1871 were, in consideration of the sum of 3650*l.*, conveyed by the freeholders to Rhodes in fee simple, "subject to but with the benefit of the said indenture of lease." By the second deed, executed immediately after the other, Rhodes, as beneficial owner, conveyed and demised to the plaintiffs all the hereditaments and property comprised in the documents specified in the schedule thereunder written, as to such of them as were freehold in fee simple; as to such of them as Rhodes was entitled to for any

term of years for all the residue then unexpired of such term or terms, except the last day thereof, respectively, nevertheless by way of mortgage only, and for more effectually securing to the plaintiffs certain moneys due on current account, or on any other account, together with interest, commission, and bank charges. The schedule comprised the title-deeds relating to the fee simple (including the conveyance to Rhodes of July 27, 1899), and the "counterpart of the lease" of January 31, 1871. No other leasehold property was mentioned or referred to in the schedule. The mortgage to the plaintiffs of July 27, 1899, was stamped only as a security for 3000*l.*, and this sum was in fact applied in completing the purchase of the freehold reversion, being paid by the bank directly to the vendors. The plaintiffs took this mortgage with actual knowledge of the mortgage of May 20, 1897, to Flower & Sons.

At the date of the plaintiffs' mortgage registration of title to land under the Land Transfer Acts, 1875 and 1897, had been made compulsory on sale in the parish of St. George, Hanover Square, by virtue of an Order in Council dated July 18, 1898.

On August 28, 1899, Rhodes applied to the Land Registry for registration as proprietor with a possessory title of the freehold land known as 10, Stafford Street, comprised in title No. 21,332, in the parish of St. George, Hanover Square, and a certificate of his registration was issued by the Land Registry on September 18, 1899. On the same August 28, 1899, Rhodes executed a charge on the same land in favour of the plaintiffs to secure the moneys secured by the mortgage deed of July 27, 1899, the charge being in the form No. 39 in the 1st schedule to the Land Transfer Rules, 1898, and he thereby also granted the land to the plaintiffs in fee simple, subject to redemption. On September 18, 1899, a certificate was issued by the Land Registry that the plaintiffs were registered as proprietors of the charge, a copy of which was annexed to the certificate.

On April 17, 1901, Rhodes executed a deed of arrangement, whereby in effect he transferred all his property to the defendant Mason in trust for his creditors. The plaintiffs were not

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parties to this deed. At this date the whole of the 3000*l.* was due to the plaintiffs, and they demanded payment from Mason, but no part of the money was paid.

Some time before June 24, 1901, Flower & Sons entered into possession of the Stafford Street premises under their mortgage, and shortly after the expiration of twenty-one days from that date the plaintiffs demanded payment of the rent for the midsummer quarter under the lease of January 31, 1871, from Mason, and also from Flower & Sons, but no rent was paid by either of them.

Flower & Sons alleged that the term created by the original lease had merged in the freehold, and that consequently they were entitled to retain possession of the premises without paying any rent during the subsistence of the term created by their mortgage security.

On October 11, 1901, the plaintiffs commenced this action against Rhodes, Mason, and Flower & Sons to enforce their security by foreclosure or sale, claiming also (1.) a declaration that the term created by the lease of January 31, 1871, had not become merged in the fee simple; (2.) a declaration that the plaintiffs were entitled to re-enter upon the premises under the proviso for re-entry contained in the lease; and (3.) that the defendants might be ordered to transfer and deliver up possession of the premises to the plaintiffs. The defendant Rhodes entered an appearance, but failed to deliver a defence.

Kekewich J. was inclined to think that there had been no merger, though he did not decide the point. But, assuming that there had been no merger, his Lordship thought that Rhodes could not by acquiring the reversion defeat the security which he had given to Flower & Sons. He could not have entered as against them under the proviso for re-entry, and the plaintiffs, who claimed under him, had no greater right than he had. The action was accordingly dismissed as against Flower & Sons.

The plaintiffs appealed.

Warrington, K.C., and *S. Arthur Sampson*, for the plaintiffs. Since the Judicature Act, 1873, merger must depend upon

intention, and it is submitted that neither in intention nor in fact has the term become merged in the reversion. The plaintiffs are not in the same position as Rhodes as regards the right of re-entry for non-payment of rent, for Rhodes himself was debarred by his own covenant from enforcing payment by re-entry. The learned judge has therefore gone too far. When the legal estate in the reversion became vested in Rhodes by the registration, he was in equity bound to convey that legal estate to the plaintiffs; it was never held by him in any other capacity than that of trustee for them. Accordingly, there never was in him in the same right a legal estate in the lease of 1871 and a legal estate in the fee so as to cause a merger. No entry was made on the register, as might have been done under s. 20 of the Land Transfer Act, 1875, of the determination of the lease. It is true the plaintiffs have acquired Rhodes' title, but not with his obligations as mortgagor. The learned judge seems to have proceeded on the theory in *Toulmin* v. *Steere* (1)—that a mortgagor cannot get in a first incumbrance of his own and then keep it alive against his own second incumbrance. But that case has since been doubted in *Thorne* v. *Cann* (2), which, it is submitted, places the law relating to a mortgagor and his successive incumbrancers upon the proper footing. Merger depends on intention, and here there could have been no intention to merge the lease of 1871 in the freehold, for the plaintiffs were asked to lend their money upon the security of a freehold ground-rent. There is no such "monstrous injustice" as was supposed by the learned judge.

P. O. Lawrence, *K.C.*, and *W. C. Druce*, for Flower & Sons. It is submitted that the effect of the conveyance of July 27, 1899, by Rhodes was, merger or no merger, to convey to the bank the whole of his estate, right, title, and interest, including his leasehold interest: Conveyancing and Law of Property Act, 1881, s. 63, sub-s. 1. If a man has a lease and also the freehold, and he conveys the freehold without mentioning the lease, the conveyance passes also the leasehold interest. Sect. 7, sub-s. 1 (c), of the Conveyancing Act, which provides that a mortgage by a person "as beneficial owner" shall include

(1) (1817) 3 Mer. 210; 17 R. R. 67. (2) [1895] A. C. 11, 16, 17.

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covenants for title, affects every particle of interest in the property which the grantor has in his possession. Even assuming that the term under the lease of 1871 did not pass by the mortgage of July 27, 1899, Rhodes certainly acquired the fee by registration on August 28, 1899, and therefore at that date, at all events, the two estates coalesced, so as to create a merger of the term. Until registration the original grantor remained the proprietor of the land: Land Transfer Act, 1875, s. 29. The registration of a charge and the registrar's certificate of charge do not pass the legal estate in the property to the person in whose favour the charge is made. This appears by the series of sections, 22 to 28 (1), headed "Mortgage of Registered Land,"

(1) "Mortgage of Registered Land.

Sect. 22: "Every registered proprietor of any freehold or leasehold land may in the prescribed manner charge such land with the payment at an appointed time of any principal sum of money either with or without interest, and with or without a power of sale to be exercised at or after a time appointed. The charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge, and the particulars of the charge, and of the power of sale, if any; the registrar shall also, if required, deliver to the proprietor of the charge a certificate of charge in the prescribed form."

Sect. 23: "Where a registered charge is created on any land there shall be implied on the part of the person being registered proprietor of such land at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negativing such implication, a covenant with the registered proprietor for the time being of the charge to pay the principal sum charged, and interest, if any, thereon, at the appointed time and rate; also a covenant, if the principal sum or any part thereof is unpaid at the appointed time, to pay interest half-yearly at the appointed rate on so much of the principal sum as for the time being remains unpaid."

Sect. 24: "Where a registered charge is created on any leasehold land there shall be implied on the part of the person being registered proprietor of such land at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negativing such implication, a covenant with the registered proprietor for the time being of the charge, that the person being registered proprietor of such land at the time of the creation of the charge, his executors, administrators, and assigns, will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the proprietor of the charge, his heirs, executors, and administrators, indemnified against all actions, suits, expenses, and claims, on account of the non-payment of the said rent, or any part thereof, or the

in the Land Transfer Act, 1875, and this view is confirmed by rule 110 of the Land Transfer Rules, 1898. Sect. 29 prescribes the only way in which the legal estate in registered land can

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breach of the said covenants or conditions, or any of them."

Sect. 25: "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may, for the purpose of obtaining satisfaction of any moneys due to him under the charge, at any time during the continuance of his charge, enter upon the land charged, or any part thereof, or into the receipt of the rents and profits thereof, subject nevertheless to the right of any persons appearing on the register to be prior incumbrancers, and to the liability attached to a mortgagee in possession."

Sect. 26: "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money named at the appointed time."

Sect. 27: "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge with a power of sale may, at any time after the expiration of the appointed time, sell and transfer the land on which he has a registered charge, or any part thereof, in the same manner as if he were the registered proprietor of such land."

Sect. 28: "Subject to any entry to the contrary on the register, registered charges on the same land shall as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created.

"The registrar shall, on the requisition of the registered proprietor of any charge, or on due proof of the satisfaction thereof, notify on the register in the prescribed manner by cancelling the original entry or otherwise the cessation of the charge, and thereupon the charge shall be deemed to have ceased.

"Transfer of Freehold Land.

Sect. 29: "Every registered proprietor of freehold land may, in the prescribed manner, transfer such land or any part thereof. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the land transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the land.

"Upon completion of the registration of the transferee the registrar shall, if required, deliver to him a land certificate in the prescribed form; he shall also, in cases where part only of the land is transferred, if required, deliver to the transferor a land certificate, containing a description of the land retained by him."

Sect. 32: "A transfer for valuable consideration of freehold land registered with a possessory title shall not affect or prejudice the enforcement of any right or interest adverse to or in derogation of the title of the first registered proprietor, and subsisting or capable of arising at the time of the registration of such proprietor; but, save as aforesaid, shall when registered have the same effect as a transfer

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be transferred. Until the mortgagee acquires the legal estate the mortgagor remains proprietor of the land. Sect. 49 shews what is the effect of unregistered dealings with registered land.

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for valuable consideration of the same land registered with an absolute title."

"Unregistered Dealings with Registered Land.

Sect. 49: "The registered proprietor alone shall be entitled to transfer or charge registered land by a registered disposition; but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned.

"The registered proprietor alone shall be entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land."

By the Land Transfer Act, 1897, s. 20: "(1.) Her Majesty the Queen may, by Order in Council, declare, as respects any county or part of a county mentioned or defined in the order, that, on and after a day specified in the order, registration of title to land is to be compulsory on sale, and thereupon a person shall not, under any conveyance on sale executed on or after the day so specified, acquire the legal estate in any freehold land in that county, or part of a county, unless or until he is registered as proprietor of the land."

"(2.) In this section the expression 'conveyance on sale' means an instrument executed on sale by virtue whereof there is conferred or completed a title under which an application for registration as first proprietor of land may be made under the principal Act."

By the Land Transfer Rules, 1898—

"Conveyance and Mortgage prior to Compulsory Registration.

Rule 78: "When a conveyance on sale of land in any county or part of a county in which registration of title is compulsory on sale, and a disposition thereof by the purchaser are delivered for registration within fourteen days after the date of the conveyance the disposition shall have the same effect in every respect as if it had been executed subsequently to the registration of the purchaser as proprietor of the land. If the land is leasehold, the words 'conveyance on sale' shall apply to a grant or assignment of a lease or sub-lease, and the word 'purchaser' shall apply to a grantee, lessee, or assignee."

Rule 106: "A charge on registered land shall be made by an instrument in Form 39 in the First Schedule hereto, with such variations as are mentioned in the notes to that form,

It is submitted that in equity there was a merger. At any rate the plaintiffs could eject Flower & Sons only by making use of the name of Rhodes, and all equities which would affect him will avail Flower & Sons against the plaintiffs.

[*Warrington, K.C.* The Court might make a declaration of the plaintiffs' right.]

If every other point should be decided against Flower & Sons, still Rhodes could not re-enter as against them. It is submitted that the Court will not make a declaration in favour of the plaintiffs. Whether there be a merger or not, Rhodes has transferred all his interest to the plaintiffs, and he could not eject Flower & Sons. The legal estate in the term passed to the bank, or, if it did not, it remained in Rhodes. If the bank acquired the legal estate, there was a merger; if the bank did not acquire the legal estate, Rhodes cannot defeat the security which he gave to Flower & Sons.

The object of s. 49 of the Act of 1875 was to keep trusts off the register. A trust can always be defeated by a transfer of the legal estate, though it binds the conscience of the person who is on the register. The object was to assimilate the

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and if there are added thereto any of the special stipulations comprised under the heads A and B in the note to that form, they shall be entered in the register."

Rule 107: "In addition to or in substitution for the stipulations permitted by Form 39, any other stipulations of which the registrar shall approve may be added to a charge; but no stipulation shall be so added referring to matters the entry of which is inconsistent with the principles on which the register is to be kept."

Rule 110: "When the proprietor of a registered charge obtains an order for foreclosure absolute, the order, or an office copy thereof, shall be delivered to the registrar, who shall thereupon enter the proprietor of the charge as proprietor (subject to prior charges) of the land, the equity of redemption in which is foreclosed."

Form 39 in the Schedule to the Rules:—

"Instrument of Charge (Rule 106).

"LAND REGISTRY.

"Land Transfer Acts, 1875 and 1897.

"District————

Parish————

No. of title————

"(Date.) In consideration of —— pounds (£——) I, A. B., of &c., hereby charge the land comprised in the title above referred to with the payment to C. D., of &c., on the —— of —— 19—, of the principal sum of £—— with interest at —— per cent. per annum, payable [half-yearly, quarterly] on the —— of ——, &c., in every year."

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position of an owner of land to that of an owner of stock. The transfer of the legal estate or a charge on the land is to be on the register; any trusts or mortgage provisions are to be contained in a separate deed. Protection can never be obtained by means of an unregistered conveyance; it is always liable to be defeated by a registered charge.

There is no notice upon the register of any lease of the property. If the parties had intended to keep alive a leasehold interest in Rhodes, they would have entered the lease upon the register, as they could have done under s. 11 of the Act of 1875, or notice of the lease could have been registered under s. 50. If the bank have stepped into the shoes of Rhodes, they cannot escape from the equities which affect him. After the execution of the deed of July 27, 1899, it would be very difficult for Rhodes to say that he was entitled to the beneficial lease if the bank had insisted that he was not.

First registration under the Act is only compulsory upon a sale of the property, and therefore registration was not necessary to complete the title of the bank: Land Transfer Act, 1897, s. 20. As regards merger, a Court of Equity always followed the law. At law a man could not be his own tenant. Supposing that in the present case there would have been a merger at law, then the question is, What would a Court of Equity have done? The intention of the Judicature Act, 1873, s. 25, sub-ss. 4, 11, was that the equitable rule should prevail. But it was not intended to enlarge the principles of equity. If the term remained in Rhodes it would (before the Judicature Act) have merged in the fee at law. A Court of Equity could not have compelled the creation of a new term. *Ingle* v. *Vaughan Jenkins* (1) was a different case from the present case. The provisions of s. 25 of the Judicature Act apply only when there is some beneficial interest in the term which would in equity have prevented merger. In such a case as the present a Court of Equity would not before the Judicature Act have interfered to prevent merger. Rhodes, the mortgagor, by acquiring the fee destroyed the term. The Court would have compelled him to grant a new lease on the same terms to

(1) [1900] 2 Ch. 368.

Flower & Sons, if they had wished to have it; but the Court would not at the instance of a third party have compelled Flower & Sons to accept a new lease against their wish.

[COZENS-HARDY L.J. It is clear that the bank knew of the existence of the lease. If the bargain was that they should lend their money upon the security of the freehold ground-rent, did not that give them such an interest in the lease as would make it inequitable that there should be a merger?]

The bank did not take (as they might have done) an assignment of the term to a trustee, and if they have blundered in their conveyancing the Court will not help them. If the intention of any one is to be considered, it should be the intention of Rhodes. He wished to acquire the freehold. A Court of Equity has never held that the relation of landlord and tenant exists in a case in which it does not exist at law.

Warrington, K.C., in reply. The real question is whether the fee and the term have coalesced. If the term was not kept on foot, the bank would have got no security but that of a reversion upon a term during which no rent would be payable. With regard to the question of intention, the Court has always considered what would be for the benefit of the parties. It could not have been the intention of either party when the mortgage of July 27 and the charge of August 28 were given that the only security of the bank, namely, the ground-rent, should be destroyed. That certainly could not have been the intention of the bank. The charge of August 28 was clearly meant to affect the interest of Rhodes, which was the ground-rent. In the absence of direct evidence of intention the Court will infer the intention by considering what would be for the benefit of the party: *Thorne* v. *Cann* (1); *Thellusson* v. *Liddard* (2); *Ingle* v. *Vaughan Jenkins* (3); and the latter case shews that the equitable rule as to the merger of charges applies equally to the merger of estates, such as a lease, or even an agreement to grant a lease. It is submitted that the term was not merged either by the conveyance of July 27 or by the mortgage of the same date. The property was expressly conveyed subject to

(1) [1895] A. C. 11. (2) [1900] 2 Ch. 635.
(3) [1900] 2 Ch. 368.

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and with the benefit of the lease, and in the schedule to the mortgage the counterpart of the lease is expressly mentioned.

[ROMER L.J. Would not the mortgagor's beneficial interest (if any) in the lease pass by the deed?]

It might do so under s. 63 of the Conveyancing Act, 1881, if there were nothing but a simple conveyance of the fee; but here there is something more than that, and the true inference is that the leasehold interest was not intended to pass. The contract with the bank was to give them the fee subject to the lease, i.e., the reversion. It could make no difference that the term was vested in Rhodes. If it had been vested in a third person, Rhodes would not under his covenant for further assurance have been bound to get it in. The effect of the mortgage was to convey only the fee simple to the bank, the term remaining vested in Rhodes. Until registration of the conveyance the legal estate in the fee remained in the vendors; the equitable fee being in the bank and the legal term remaining in Rhodes. The registration of the conveyance passed the legal fee to Rhodes. The defendants Flower & Sons are not the legal owners of the original term; they are only the owners of a term carved out of it. Sect. 25, sub-s. 4, of the Judicature Act was intended to preserve the rights of the parties as they would have been but for merger. Flower & Sons lent their money on the assumption that they were to have a security upon a subsidiary term, and now they are endeavouring to get something which was not included in their security. Their equity is inferior to that of the bank. They are only entitled to have their term preserved. The bank have a beneficial interest in keeping the original term alive. Rhodes was a trustee of the last day of the term for the bank.

[COLLINS M.R. Is a beneficial interest in a covenant to keep alive the term the same thing as a beneficial interest in the term itself?]

There is no substantial difference. *Snow* v. *Boycott* (1) is another instance of merger being prevented by intention. When Rhodes acquired the legal fee by registration he had already granted the equitable fee to the bank, and was a

(1) [1892] 3 Ch. 110.

trustee of the legal fee for them. They were entitled under his covenant for further assurance to call for a transfer of the fee. By the mortgage to the bank he declared that the fee belonged to them, not to himself; after that he was no longer dominus of the legal fee. The legal term was vested in him subject to the subsidiary term in Flower & Sons. In equity he was not dominus of the legal term, for he had covenanted to transfer it to a purchaser from Flower & Sons, or to stand possessed of it in trust for them. The result is that the equitable doctrine as to merger applies, even if there was a merger at law.

But it is not clear that there would have been a merger at law. Even Courts of law are not favourable to the doctrine of merger: *Brandon* v. *Brandon* (1), per Kindersley V.-C. For instance, if a man had a term as executor and had the reversion in fee in his own right, there would have been no merger at law. And now, under s. 25, sub-s. 4, of the Judicature Act, 1873, the equitable doctrine is made to apply to legal estates, and if there would be no merger in equity there will be none at law. And by s. 24, sub-s. 4, the Courts must "recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery" would have done before the Act. The Court must now give effect to any equitable claim which would displace the legal right. An equity can be set up even against a stranger: *Chambers* v. *Kingham*. (2) This case was not cited in either *Snow* v. *Boycott* (3) or *Ingle* v. *Vaughan Jenkins*. (4) Even if the term passed by the charge of August 28, still there would be no merger. The result of the judgment of Kekewich J. is that Flower & Sons obtain a benefit for which they never bargained, while the bank are practically deprived of their security.

Then, if there is no merger, it is submitted that the legal estate in the reversion has passed to the bank, and they are entitled to enter for non-payment of the rent reserved by the

(1) (1861) 31 L. J. (Ch.) 47, 49.
(2) 10 Ch. D. 743.
(3) [1892] 3 Ch. 110.
(4) [1900] 2 Ch. 368.

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lease of 1871. The legal estate in fee passed to the bank either by the mortgage of July 27 or by the registered charge of August 28. It is said that s. 22 and the following sections of the Land Transfer Act, 1875, shew that the legal estate did not pass. But those sections are dealing with registered charges, not with mortgages strictly so called. As regards registered dealings with registered land, the legal estate is not material. Those sections contemplate charges, as distinguished from mortgages which pass the legal estate. This is shewn especially by s. 25, which gives the registered proprietor of the charge power to enter on the land charged, and s. 26, which enables him to enforce foreclosure or sale, in the same way as he might have done if the land had been transferred to him by way of mortgage. There is nothing in the Act to prevent the giving of an ordinary mortgage passing the legal estate to the mortgagee; and s. 49 allows any person, whether the registered proprietor or not, who has a sufficient estate in the land, to create estates, &c., as if the land were not registered. An unregistered mortgage will therefore be valid, though it is liable to be defeated by the registered proprietor, if notice of it is not entered on the register. And, indeed, the words of grant contained in the registered charge of August 28 are sufficient to pass the legal estate to the bank. Rule 107 of the Land Transfer Rules, 1898, permits the addition to the statutory form No. 39 of "any other stipulations which the registrar shall approve"; and here the registrar has approved of the charge of August 28 containing words of grant, and has registered it. If the legal estate is outstanding in Rhodes, he is a trustee of it for the bank, and is bound to re-enter for their benefit.

But if the Court makes a declaration of the plaintiffs' right, that will probably be sufficient for them, without actual possession. Flower & Sons will no doubt in that case pay the rent.

Cur. adv. vult.

Feb. 26. COLLINS M.R. read a judgment in which, after stating the facts, he continued:—The principal question is

whether on the purchase by Rhodes of the fee his term was merged in the reversion, the result of which would be that the defendants Flower & Sons would hold directly under the owner of the fee (8 & 9 Vict. c. 106, s. 9), without any obligation to pay rent, while, the term held by Rhodes being extinguished, the rent of 100*l.* a year would be no longer payable, and the security held by the bank would be land subject to a term not expiring until 1968, during which no rent could be received. The bank accordingly by this action claim as their principal relief a declaration that there has been no merger of the term in the fee. They also claim a declaration that they are entitled to re-enter upon the premises, under the proviso for re-entry in the lease of January 31, 1871, which created the term, and they also demand possession of the premises. As to these two latter claims, it is quite clear that the bank cannot make them good unless the legal estate is vested in them. This, however, is a subordinate point, so far as the ultimate rights of the parties are concerned, since the plaintiffs would have no difficulty in getting in the legal estate if they are right on the principal question.

The question, therefore, in this view resolves itself into one of merger or no merger. Now it seems to me quite clear that, if the intention of the parties is that which determines this question, they certainly did not intend that a merger should take place. It is clear upon the facts that Rhodes could not have carried out his intention of purchasing the reversion without the co-operation of the bank, and that it was an essential condition of his obtaining that advance that he should be able to offer them the security of the rent of 100*l.* a year, payable under the lease of January 31, 1871. Apart from the terms of the instruments themselves, by which the transactions were carried out, this is abundantly clear from the conditions of sale at the auction, which describe the property put up as "a freehold ground-rent," and refer to the value of the reversion and the substantial premium likely to be paid for a renewal of the lease, and also from the document forwarded by the bank manager, with whom Rhodes opened negotiations, to the head office. This latter document

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contains the particulars of the advance demanded and the security offered, together with some observations as to the nature of the security. The security offered is described, in terms similar to those in the conditions of sale, as a freehold ground-rent of 100*l.* per annum, and the value assigned to it is 3650*l.* The conveyance of the fee to Rhodes on July 27 is stated to be "subject to, and with the benefit of," the term, and in the mortgage of the same date from Rhodes to the bank he conveys and demises to them all the hereditaments and property mentioned in the schedule "to hold such of them as are freehold in fee simple, and as to such of them as the mortgagor is entitled to for any term or terms of years (whether absolute or determinable) for all the residue now unexpired of such term or terms of years, except the last day thereof respectively," and in the schedule is set out the counterpart of the lease of January 31, 1871. It is said by the defendants that the only intention of Rhodes was to relieve himself of the burden of paying the rent of 100*l.* a year by acquiring the reversion; but, though this was his ultimate object, I think he must equally be taken to have intended to bring it about by the co-operation of the bank, and consequently to do nothing which, by impairing the security which he had to offer to the bank, would tend to defeat his purpose. In point of fact the transaction could not have been carried out at all unless the term was kept alive, and it was clearly for the benefit of both parties to the transaction that it should be kept alive. It was suggested for the defendants, Flower & Sons, that the rule of equity that the question of merger must be decided by the intention of the parties was limited to the question of the merger of charges only, and did not apply to the merger of estates. I think there is no foundation for this distinction. In fact, as it seems to me, merger in its primary signification properly applies to estates, and s. 25, sub-s. 4, of the Judicature Act, 1873, in terms refers only to "estates" as the subject of merger. Moreover, that point has been decided against the respondents by Fry J. in *Chambers* v. *Kingham* (1), where the question was as to the merger of a term in the reversion; and Farwell J.

(1) 10 Ch. D. 743.

has given an independent opinion to the same effect in the recent case *Ingle* v. *Vaughan Jenkins* (1), in which *Chambers* v. *Kingham* (2) does not appear to have been cited. On this point the inclination of the opinion of Kekewich J., though he did not decide the point, was against there being a merger. It was contended by the bank that there had been no merger in fact in this case, even if the rule of equity did not apply. This contention involves a minute examination of the position of the legal and equitable estates in the somewhat complicated transaction of the sale to Rhodes and the mortgage to the bank, followed by the proceedings upon registration. In my view it is not necessary to decide whether, but for the Judicature Act, there would have been a merger at law. But I am not satisfied that in either of the views put forward by the bank as to the operation of the different instruments in this case there would not have been a merger at law.

It is necessary, however, to follow out the transaction in order to see whether the plaintiffs have got the legal estate, for without it they certainly cannot succeed on two heads of the relief which they claim. This point turns on the effect of some sections of the Land Transfer Act, 1875. By s. 20, sub-s. 1, of the Land Transfer Act, 1897, after registration of title to land has been made compulsory in any county or part of a county, "a person shall not under any conveyance on sale . . . . acquire the legal estate in any freehold land in that county, or part of a county, unless or until he is registered as proprietor of the land." By s. 29 of the Land Transfer Act, 1875, it is enacted: "Every registered proprietor of freehold land may, in the prescribed manner, transfer such land or any part thereof. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the land transferred, but until such entry is made the transferor shall be deemed to remain proprietor of the land." It was contended, therefore, that Rhodes, whose title was not completed by registration till September 18, 1899, was not in a condition to pass the legal estate to the bank by the mortgage of July 27, 1899, and that the subsequent instrument of charge of August 28, 1899, although it purports

(1) [1900] 2 Ch. 368. (2) 10 Ch. D. 743.

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to grant the legal estate, could not, on the true construction of the statute, have been effectual to do so. This latter point depends upon the construction of certain sections of the Land Transfer Act, 1875. By s. 29 the registered proprietor on transfer by him in the prescribed manner remains proprietor until his transferee is registered as proprietor, and by s. 49 the registered proprietor "alone shall be entitled to transfer or charge registered land by a registered disposition." It was argued, therefore, that Rhodes, being proprietor and owner as such of the legal estate, could not substitute any one else for himself as proprietor otherwise than by registered transfer; that apparently no other machinery is provided by the Act for passing the legal estate directly from him; and that it would seem, therefore, that the dispositions contemplated by the latter part of the section, which are in terms made "subject to the maintenance of the estate and right of such proprietor," do not include grants of the legal estate outside the register. The sections as to charges (22 to 28), though they bear the heading "Mortgage of Registered Land," seem to be all framed on the footing that the legal estate remains in the registered proprietor. There is a separate register for charges, and the person in whose favour the charge is made becomes the proprietor of the charge, while the grantor still continues to be on the other register as the proprietor of the land; and (s. 23) certain covenants are implied between them; and by s. 27 the registered proprietor of the charge with a power of sale may sell and transfer the land in the same manner as if he were the registered proprietor of it. Sect. 26 gives to the holder of the charge the same power of foreclosure and sale as "if the land had been transferred to him by way of mortgage." And by rule 110 of the Land Transfer Rules, 1898, the proprietor of the charge, on obtaining the order for foreclosure, must deliver it to the registrar, who must thereupon enter him as proprietor of the land. All these provisions seem to shew that the charge itself does not carry the legal estate or override the primary provision that the original proprietor remains in possession of it till the holder of the charge has been registered in his place.

At the close of the argument the inclination of my judgment

certainly was that the mortgage by Rhodes before he became "proprietor" did not pass the legal estate, and that the statutory charge could not, consistently with the scheme of the Act, be made to do so by introducing words of grant into it. The statutory forms certainly do not suggest any such possibility. I have, however, had an opportunity of reading the judgment of my brother Cozens-Hardy L.J., in which my brother Romer L.J. agrees, and, though I am not free from doubt, I am not prepared to differ from them.

It remains to consider whether the evidence of intention, as well as of benefit to Rhodes and the bank if the term were kept in existence, is not such as to prevent a merger as the law now stands. The law to be deduced from the previous authorities was summed up by Lord Macnaghten in the well-known passage in *Thorne* v. *Cann* (1), and was applied to the case of leases by Fry J. and Farwell J. in the cases which I have already mentioned. I think those authorities clearly establish that in the present case, neither on the sale to Rhodes nor on the mortgage by him to the bank, would "the beneficial interest in" the term have been "deemed to be merged or extinguished in equity," and that therefore the transaction falls within s. 25, sub-s. 4, of the Judicature Act, 1873, and there is no merger at law. Nor can I see that Messrs. Flower & Sons have any claim for consideration in the matter. They would come in, no doubt, to a valuable windfall if it should turn out that a merger had in fact been effected, but their original position remains unaffected if it has not. In my opinion, for the reasons I have given, there has been no merger, and the plaintiffs are entitled to a declaration to that effect.

As I have already said, the learned judge was disposed to think there had been no merger, but decided the case against the plaintiffs on the ground that they must claim under Rhodes, and that, inasmuch as Rhodes was bound as between himself and the defendants, Flower & Sons, to relieve them from any liability in respect of his failure to pay the rent, the plaintiffs were not in a position to enforce any right which Rhodes himself could not have enforced. The defendants did not rely upon

(1) [1895] A. C. 18, 19.

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this ground before us, and it seems to me that the plaintiffs, as assignees of the reversion on Rhodes's term, are in no way bound by the mere personal undertaking between Rhodes and his sub-lessees. For these reasons I think this appeal must be allowed, and that the plaintiffs are entitled to the second and third heads of relief claimed.

ROMER L.J. I have had an opportunity of reading the judgment which Cozens-Hardy L.J. is about to deliver, and as I agree with it, as well as with the judgment which has just been read by the Master of the Rolls, I need not add anything.

COZENS-HARDY L.J. read the following judgment:—Two questions arise—(1.) whether under the peculiar circumstances of the case the lease of January, 1871, is merged in the freehold, with the result that Flower & Sons, who are mortgagees by way of underlease, can hold the property free from any rent; and (2.) whether the legal reversion is vested in the bank so as to entitle them to re-enter for non-payment of rent, assuming that the lease is not merged. [His Lordship stated the facts, and continued:—]

Now, as to the first question, there was prior to the Judicature Act, 1873, a great difference between the Courts of Law and the Courts of Equity on the subject of merger. The rule of the former was rigid, that whenever a term of years and a freehold estate, whether for life or in fee, immediately expectant upon the term, vested in the same person in his own right, the term was merged in the freehold, whatever may have been the intention of the parties to the transaction which resulted in the union. The Courts of Equity, on the other hand, in many cases treated the interest which merged at law as being still subsisting in equity. They had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place. Perhaps the commonest application of these principles was when a tenant for life paid off a charge upon the inheritance. The charge was

considered to be still kept alive for his benefit, or for the benefit of his executors, although, if an owner in fee had paid off the charge, no such consequence would have followed. These principles were applicable equally to the merger of estates in land as to merger of charges on land. It was well established that, according to the strict rules of the common law, there would be merger, notwithstanding that one of the two estates might be held in trust, and the other beneficially, by the same person, or one might be held on one set of trusts and the other on another set of trusts. But it was equally well established that equity would interfere, and would, if necessary, decree the execution of such deeds as would replace the parties in their proper position: see *Saunders* v. *Bournford* (1), where Lord Nottingham L.C. decreed that, notwithstanding the merger of a term, the plaintiff should hold possession of the premises during the remainder of the term, and that the defendant should make a further assurance of the remainder of the term. The merger was treated as an accident prejudicial to the real beneficial interests of the parties: see also *Attorney-General* v. *Kerr* (2), a remarkable instance of the application of the equitable doctrine. I think the decision of Farwell J., or rather his dictum to this effect, in *Ingle* v. *Vaughan Jenkins* (3), is consistent with principle and is supported by authority. A Court of Equity had regard to the intention of the parties, to the duty of the parties, and to the contract of the parties, in determining whether a term was to be treated as merged in the freehold.

This being the state of the law prior to the Judicature Act, 1873, it was enacted by s. 25, sub-s. 4, of that Act that "there shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity."

The result seems to be that, if the circumstances are such that a Court of Equity would have held that there was no merger in equity, there is now no merger at law, and the rights

(1) (1679) Finch, 424. (2) (1840) 2 Beav. 420; 50 R. R. 221.
(3) [1900] 2 Ch. 368.

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of the parties must be dealt with on that footing. Now it is impossible to doubt that it was the intention of both parties that the bank should have a security on the unincumbered freehold reversion, subject to the lease. This was the real bargain, and it was plainly to the interest of the bank. The money would not have been advanced to Rhodes except on the security of the freehold ground-rent. This being so, it follows that, whatever forms were adopted, no merger which would destroy the ground-rent ought to be allowed, and it might be sufficient to leave the case there.

But it is perhaps desirable to consider the various steps. By reason of s. 20 of the Land Transfer Act, 1897, the conveyance of July 27, 1899, did not upon delivery pass the legal estate. It remained in the vendors until August 28, when Rhodes was first registered as proprietor. Therefore, on the execution of the conveyance, Rhodes had the equitable fee and the legal term, and thus far there was no merger. The charge of July 27 in favour of the bank operated upon the equitable fee and also upon the legal term. Whether it made the bank assignees of the term, or whether it gave the bank an interest short of the legal term, is a question of some difficulty. In the former view there can have been no merger, unless and until the bank acquired the legal fee by reason of the charge of August 28. In the latter view there might be a merger the instant the legal fee vested in Rhodes on August 28 upon his being entered on the register of proprietors. Upon the whole I think the latter view—i.e., that the bank did not become legal assignees of the term—is preferable and more in accordance with the language of the mortgage of July 27.

But for my present purpose it is not material to consider which view is correct. The intention of the parties was clear that there should not be a merger. Moreover, the terms of the mortgage by way of sub-demise in favour of Flower & Sons serve to support this conclusion. For by that mortgage Rhodes irrevocably appointed Flower & Sons his attorneys, to assign and transfer the last day of the term, and further declared that on a sale or foreclosure he would stand possessed of the last day in trust for the purchaser or persons foreclosing. It may

well be argued that his position as trustee rendered it improper, if not impossible, for him to merge the term. But I prefer not to rely upon this argument. It is sufficient to say that Flower & Sons have no right as against the bank to something for which they never bargained with Rhodes, and which, if they get it at all, is due to a mere accident. The result is that, in my opinion, there has been no merger of the term, and there must be a declaration to that effect.

The second question obliges me to consider carefully the scheme of the Land Transfer Act, 1875, as modified by the Land Transfer Act, 1897. It is to be observed that there was no compulsion under the Act of 1875, and, with one exception, there is no compulsion, direct or indirect, under the Act of 1897. The Acts establish a register of proprietors and a register of charges. The term "proprietor" is somewhat misleading, for persons entered in the register of proprietors need not have the legal fee vested in them, nor even any estate in the land—e.g., a tenant for life may be the registered proprietor, or a trustee with power of sale, but without any estate (s. 6 of the Act of 1897), or the registered proprietor may be a mere nominee (s. 5 of the Act of 1875). So far as I am aware, no mention is made of "legal estate" except in s. 20 of the Act of 1897, and in rule 59 of the Land Transfer Rules, 1898. The registered proprietor, whoever he may be, has a statutory power to transfer the property by a registered disposition, subject only, when the transfer is for value, to such incumbrances, restrictions, inhibitions, and notices as are inserted in the register or mentioned in the statutes (ss. 29 and 30 of the Act of 1875), and subject also, when the land is registered with a possessory title, to the provisions of s. 32 of the same Act. The registered proprietor has also a statutory power to create charges (s. 22 of the Act of 1875). In short, the register of proprietors is not material for the purpose of ascertaining where the legal estate is. The transfer by registered disposition takes effect by virtue of an overriding power, and not by virtue of any estate in the registered proprietor. By s. 49 of the Act of 1875 the registered proprietor is the only person who can transfer or charge registered land by a registered

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disposition; but that section proceeds to say that, "subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned." It is remarkable that the section does not say that any person, *not being the registered proprietor*, may create estates by unregistered deeds. It expressly includes the registered proprietor in the class of persons who may do so. There is nothing to suggest that all estates created by unregistered deeds must be equitable. Indeed it seems clear that a lease granted by an owner in fee or by a limited owner by an ordinary unregistered deed will pass the legal estate, except in the case provided for by rule 59 of a lease for a term of forty years or more, or for two or more lives. The express provision in this case—that the legal estate shall not pass until registration—implies that by every other lease the legal estate will pass. I can find nothing which prevents the passing of the legal estate by a mortgage created by an ordinary deed, executed by an owner in fee, whether he is or is not a registered proprietor, and s. 49 seems to me to assert the contrary. Notwithstanding that the land has become registered land, it may still be dealt with by deeds having the same operation and effect as they would have if the land were unregistered, subject only to the risk of the title being defeated, or, in the language of s. 49, the "estate" being "impaired" by the exercise of the statutory powers of disposition given to the registered proprietor, against which the mortgagee must protect himself by notice on the register. It is worthy of remark that s. 20 of the Act of 1897, which provides that a person shall not under a conveyance on sale acquire the legal estate, unless and until he is registered as proprietor, is by

sub-s. 2 limited to the first registration. In other words, it is merely a sort of indirect compulsion, a means of getting land on the register; it does not alter the general scheme of the Act after the land is once upon the register. The legal estate will pass on any subsequent conveyance on sale without registration. There is no penalty imposed for non-registration, although the land, where, as in the present case, registration is compulsory, cannot be removed from the register (s. 17 of the Act of 1897); there is no necessity for any change to be made in the register of proprietors. Conveyancing may proceed just as if the Acts of 1875 and 1897 had not been passed. Self-interest and the desire for security will doubtless induce persons, whether purchasers or mortgagees or lessees, to make use of the registers. But the legal operation and effect of common law assurances will remain untouched by the want of registration. I have not forgotten that there are special powers conferred upon the registered proprietor to create charges in the prescribed manner, which will not pass the legal estate, but which give a right of entry, a power of sale, and the right to foreclose, with an ultimate right, after foreclosure absolute, to apply to be registered as proprietor of the land (ss. 22–28 of the Act of 1875). But these provisions do not seem to me to negative or exclude the operation and effect of a common law unregistered mortgage. If it be urged that there is no express provision enabling a person claiming under or through an unregistered conveyance to procure himself to be registered as proprietor, I think the answer is supplied by ss. 93, 95, and 96 of the Act of 1875. If the registered proprietor refuses to do what is right, the Court has full power to direct the register to be rectified in such manner as it thinks just. I may add that there is no express provision for the case of a "nominee" refusing, on the request of the proper persons, to execute a registered disposition. But I cannot doubt that the sections above referred to suffice to enable the Court, in all cases for which no express provision is made in the Acts or in the Rules, to cause the register of proprietors to be rectified, so as to confer the statutory benefits of registration upon any person who, in the opinion of the Court, is

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entitled to claim those benefits. It is important to observe that a mortgagee who desires to take advantage of the special statutory privileges conferred by a registered charge must take a charge "in the prescribed manner" (s. 22 of the Act of 1875). Rule 106 gives, by reference to the schedule, a form (39) by which the legal estate does not pass, with certain optional variations and special stipulations. Any departure from this form is attended with some risk. I think it is clear that a mortgagee could not insist upon the registration of a deed in the statutory form with the addition of a conveyance of the legal estate, which is the form adopted in the present case. But, by rule 107, "in addition to or in substitution for the stipulations permitted by form 39, any other stipulations of which the registrar shall approve may be added to a charge." The registrar has in fact approved of this particular addition, treating it as a "stipulation," and has entered the deed on the register. It is not, however, material for the purpose of the present appeal to consider whether the entry of the deed on the register as a statutory charge was or was not authorized, for in either case the legal estate passed. The result is that, in my opinion, the legal estate is vested in the appellants by virtue of the instrument of August 28, and that they have the legal right of re-entry for non-payment of rent under the still subsisting lease, vested in Rhodes or persons claiming through him. It follows that the appeal must be allowed, and a declaration made in the terms of paragraph 2 of the claim, and the respondents must pay the costs of the action and of this appeal.

Solicitors: *Cameron, Kemm & Co.; Crossman, Prichard & Co.*

W. L. C.

QUICKE *v.* CHAPMAN.

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[1902 Q. 170.]

Easement—Implied Grant—Derogation from Grant—Light—Building Agreement—Lease to be granted on Completion of House—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-s.* 2.

By a building agreement between the Ecclesiastical Commissioners and the defendant the right was given to him to enter upon a piece of land belonging to them for the purpose of erecting a number of houses upon it. As each house should be erected and completed to the satisfaction of the Commissioners they agreed to grant a lease of it to the defendant for ninety-nine years. The lease was to be in a specified form, one of the clauses in which provided that the Commissioners should have power to erect on the land adjoining the demised land any buildings whatsoever, whether they should or should not affect or diminish the light enjoyed by the lessee. It was also provided by the agreement that nothing therein contained should be deemed to operate as an actual demise of the land to the defendant, or to create as between him and the Commissioners the relation of tenant and landlord.

On one of the plots the defendant erected a house (No. 28), and the Commissioners granted to him a lease of that house in the specified form. The defendant sold that house to the plaintiffs, and transferred the lease of it to them. He afterwards erected on an adjoining plot a house (No. 30) which when completed obstructed the access of light to some of the windows of the plaintiffs' house. They brought an action against the defendant claiming an injunction and damages:—

Held, that, at the time when the defendant transferred the lease of No. 28 to the plaintiffs, he had not under the building agreement such an interest in the adjoining plot (No. 30) as would enable him to make an express grant of an easement of light over it, and that consequently no such grant by him could be implied.

Decision of Kekewich J. reversed.

The provision of s. 6, sub-s. 2, of the Conveyancing Act, 1881, that a conveyance of land with houses on it shall operate to convey with the land (inter alia) all lights appertaining to the land or enjoyed therewith, applies only to such lights as the grantor could grant by express words, and does not operate to convey an easement of light which he has no power to grant expressly.

Appeal from a decision of Kekewich J. (1)

The plaintiffs claimed an injunction to restrain the defendant from interfering with the access of light to a house No. 28,

(1) W. N. (1902) 163.

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Stamford Brook Road, Hammersmith, belonging to them, and damages.

W. G. Chapman, the defendant, was a builder, and on August 29, 1899, he entered into an agreement with the Ecclesiastical Commissioners for England by which, in consideration of the agreement thereinafter contained on the part of the Commissioners to grant leases of the messuages to be erected on the land delineated and coloured pink on a plan annexed to the agreement, and containing more than two acres, and situate on the north-west side of Stamford Brook Road, it was mutually agreed between and by the parties that the grantee might immediately after the execution of the agreement, and subject to the rights of the existing tenant, enter upon the land coloured pink "for the purpose of carrying out the several works thereinafter agreed to be done by him, but for no other purpose whatever."

The grantee was to pay compensation to the existing tenant.

The grantee agreed (inter alia) that he would, to the satisfaction of the Commissioners' surveyors, erect and completely finish fit for habitation upon the pink land, until the whole thereof should be leased as in the agreement provided, private dwelling-houses of the respective kinds, within the respective times, and in accordance with the other provisions thereinafter contained. Not less than eight of the houses were to be erected before June 24, 1900, and afterwards not less than five more in each succeeding year until the whole of the pink land should have been built on or leased. It was provided that the grantee should in the meantime, and until leases should have been granted in pursuance of the agreement therein contained of all the land thereby agreed to be demised, pay to the Commissioners by way of rent for the said land during the term of ninety-nine years from June 24, 1899, the sums therein respectively mentioned, or so much of the same respective rents for the time being payable as should not have been reserved by any lease or leases actually granted pursuant to the agreement, such rents to be recoverable in default of payment as if the same were rent reserved on a common demise and in arrear.

The Commissioners agreed that they would, at the request

and cost of the grantee, when and as any one or more of the said dwelling-houses should be erected and completed to the satisfaction of the surveyors and certified so to be by them, demise such dwelling house or houses unto the grantee, or such person or persons as he should direct. Each lease so granted was to be in a form signed the same day by the parties thereto. The term for which every such lease should be granted was to be ninety-nine years from June 24, 1899. Until leases should have been granted of all the land thereby agreed to be demised, the grantee agreed that he would duly perform and observe all and every the covenants and agreements agreed to be inserted in such leases by or on the part of the lessee, in like manner as he would be bound to do if such leases had actually been granted to him, and the counterparts thereof had been duly executed by the grantee (so far as the nature of the case would permit of the observance or fulfilment thereof), and meanwhile the grantee would permit the Commissioners and their agents at all times to enter the premises. If the grantee should not observe and perform all and singular the agreements and provisions therein or in the leases therein agreed to be granted contained, and on his part to be observed and performed, the Commissioners might re-enter on the premises, or such part thereof as should be then undemised, as if the agreement had not been made, and from and after such re-entry the agreement and every clause, matter, and thing therein contained on the part of the Commissioners should thenceforth determine and be absolutely void. "Nothing herein contained shall be deemed to operate as an actual demise to the grantee of the lands the subject of this agreement or any part thereof, or to create as between the grantee, on the one hand, and the Commissioners, on the other hand, the relationship of tenant and landlord."

The form of lease referred to in this agreement and signed by the parties contained the following clause: "The said lessors shall at all times have power, without obtaining any consent from or making compensation to the said lessee, to deal as the said lessors may think fit with any of the lands and premises adjoining or opposite or near to the hereditaments

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hereby demised, and to erect or suffer to be erected on such adjoining, opposite, or neighbouring lands or premises any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now, or at any time during the said term hereby granted, be enjoyed by the said lessee, or other the lessees, tenants, or occupiers of the hereditaments hereby demised or any part thereof."

In accordance with the agreement Chapman erected a house, known as No. 28, Stamford Brook Road, on a part of the land comprised in the agreement, and on March 28, 1901, the Commissioners granted to him a lease of that house in the form referred to in the agreement, for a term of ninety-seven and a quarter years from March 25, 1901, at the rent and subject to the covenants and conditions therein reserved and contained.

The lease was registered by Chapman, under the Land Transfer Acts, 1875 and 1897, with a possessory title, and on August 2, 1901, by an instrument of transfer of land and discharge of a registered charge under the Land Transfer Acts, in consideration of 250*l.* paid to Chapman and 400*l.* paid to his mortgagee, Chapman transferred to the plaintiffs the land comprised in title 3207 (that is, the house and premises No. 28, Stamford Brook Road) for the residue of the term granted by the registered lease, and the mortgagee discharged the same from the charge in his favour.

On August 2, 1901, Chapman had commenced building a house (afterwards known as No. 30, Stamford Brook Road) upon a plot of land immediately adjoining the plaintiffs' house, in accordance with plans approved by the Commissioners under the provisions of the building agreement; but no lease of No. 30 had then been granted by the Commissioners to Chapman, and he was not entitled to a lease until the house was completed. Chapman had before August 2 commenced putting in the foundations of the house, and the plaintiffs were aware that a house would be erected on that site, and that it would be larger than the other houses in the road, but they did not know whether it would or would not, when completed, interfere with the access of light to their house.

When the house No. 30 was completed the plaintiffs found

that it did obstruct the access of light to some of the windows of their house No. 28, and they brought this action against Chapman, on the ground that by obstructing their light he was derogating from his own grant to them by the transfer of August 2, 1901.

The plaintiffs claimed an injunction to restrain the interference with their light; a mandatory injunction to compel the defendant to remove the obstruction, and damages for the obstruction until removal; or, in the alternative, damages.

Kekewich J. held that, at the date of the transfer of the lease of No. 28 to the plaintiffs, the defendant had such an interest in the adjoining plot No. 30 as to bring him within the maxim that a man cannot derogate from his own grant; that by virtue of s. 6, sub-s. 2, of the Conveyancing Act, 1881, the defendant was under an express personal obligation not to build on the site of No. 30 so as to obstruct the access of light to the plaintiffs' house; and that the defendant was liable in damages for the breach of this obligation. And the learned judge assessed the damages at 33*l*.

The defendant appealed.

P. O. Lawrence, K.C., and *R. J. Parker*, for the defendant. It is contended that the defendant has in no way derogated from any grant which he made to the plaintiffs. There cannot be an implied grant of an easement, such as light, unless the supposed grantor would have been capable of making an express grant of it. A man cannot by implication grant that which he has not. The extent of a grant must be measured by the estate which the grantee has at the time when he makes the grant. The grant cannot be enlarged by reason of his subsequently acquiring a larger estate: *Booth* v. *Alcock*. (1) The maxim that a man shall not derogate from his own grant does not entitle the grantee of a house to an easement of light inconsistent with the intention to be implied from the circumstances (such as a building scheme) existing at the time of the grant and known to the grantee: *Birmingham, Dudley and District Banking Co.* v. *Ross*. (2)

(1) (1873) L. R. 8 Ch. 663. (2) (1888) 38 Ch. D. 295.

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[ROMER L.J. referred to *Beddington* v. *Atlee* (1), in which it was held by Chitty J. that no grant of light to a house could be implied over land which the owner had contracted to sell to the defendant before the sale or conveyance of the house to the plaintiff.]

Pollard v. *Gare* (2), which may be relied on, is distinguishable from the present case. There was no such building scheme as in the present case. The decision was also founded on s. 6, sub-s. 2, of the Conveyancing Act, 1881, and on *Broomfield* v. *Williams* (3), in which it was held that there was not in the conveyance enough to shew a "contrary intention" within the meaning of sub-s. 4 so as to exclude the operation of sub-s. 2.

[ROMER L.J. referred to *Godwin* v. *Schweppes, Limited* (4).]

In the present case it is contended that, by virtue of the building agreement, the defendant had nothing more than a licence to enter on the plots for the purpose of building houses on them. Until a house had been built on a plot he had no such interest in the plot as would enable him to grant an easement of light over it. He could not when he conveyed No. 28 to the plaintiffs have expressly granted to them an easement of light over the plot on which No. 30 has since been built, and consequently no such grant can be implied. He was not entitled to a lease of that plot until the house had been erected which obstructs the plaintiffs' lights, and the lessors are by the express terms of the building agreement entitled to build on the plots as they please, even if by so doing they obstruct the access of light to any of the other houses. And it is expressly provided that the agreement shall not constitute the relation of tenant and landlord between the defendant and the Commissioners. Sect. 6, sub-s. 2, of the Conveyancing Act only renders it unnecessary to insert the word "lights" in a conveyance of land with houses upon it; it does not enable a man to grant that which he has not.

There is no personal covenant by the defendant which could

(1) (1887) 35 Ch. D. 317.
(2) [1901] 1 Ch. 834.
(3) [1897] 1 Ch. 602.
(4) [1902] 1 Ch. 926.

bind land which he acquired after the conveyance to the plaintiffs.

If the plaintiffs are entitled to damages, the damages must be measured by the interest which the defendant had when he conveyed to the plaintiffs, and as he was then a mere licensee of No. 30 the damages must amount to nothing.

Warrington, K.C., and *C. T. Mitchell*, for the plaintiffs. It is submitted that the defendant had such an interest in the plot No. 30 as to make the doctrine that a man cannot derogate from his own grant applicable. It is admitted that there is no personal obligation on the part of the defendant. That doctrine applies to a grantor who has only a limited interest, such as a term of years: *Booth* v. *Alcock*. (1) *Beddington* v. *Atlee* (2) does not apply, for the defendant was something more than a mere licensee. Under the building agreement he had a species of tenancy in the land, which was to be enlarged into a lease upon certain terms. A mere licence is revocable, but here the defendant could have restrained the Commissioners from ejecting him so long as he fulfilled the conditions of the agreement. In point of law the defendant was really a tenant of the Commissioners, whatever was said in the agreement to the contrary. The payment of "rent" implies a tenancy, and is inconsistent with a mere licence. The power reserved to the Commissioners to re-enter shews that there was a tenancy. To the extent of his interest the defendant could bind it by a grant of an easement. He could have dealt with his interest in a manner consistent with the rights of the plaintiffs, and he was bound to do so. He could have fulfilled his obligations to the Commissioners by building in such a way as not to interfere with the plaintiffs' right to light. He ought not to have submitted to the Commissioners the plan of a house which would derogate from his implied grant to the plaintiffs. The principle of *Day* v. *Singleton* (3) applies. There it was held that the vendor of a lease, which he could not assign without a licence from the lessor, was bound to do his best to procure that licence. The right of the Commissioners to build as they pleased on any

(1) L. R. 8 Ch. 663. (2) 35 Ch. D. 317.
(3) [1899] 2 Ch. 320.

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plot does not affect the question as between the defendant and the plaintiffs.

COLLINS M.R. The plaintiffs claim to be entitled, by virtue of an implied grant, to the light coming to certain windows in a house which they acquired from the defendant, and they complain that the defendant has obstructed that light. It is admitted that if there be any grant of light it must be one implied from the circumstances; there was no express grant of light made by the defendant to the plaintiffs, and if there is any implication it must be derived from the terms of the grant of the house itself, into which are to be read the general words mentioned in s. 6, sub-s. 2, of the Conveyancing Act, 1881. The provisions of that section have been considered in several cases, and the result of them was, I think, well stated by Joyce J. in *Godwin* v. *Schweppes, Limited.* (1) There the learned judge said: "There are no express general words in any of the deeds; but by s. 6, sub-s. 2, of the Conveyancing Act, 1881, there are imported the words as to lights which I have already mentioned. Easements and privileges legally appendant or appurtenant to property pass by a conveyance of the property simply without any additional words; but before the Conveyancing Act of 1881 easements and privileges which were used and enjoyed with or reputed to appertain to the property without being legally appendant or appurtenant did not pass by a conveyance of the property without being expressly mentioned. It was decided in *Booth* v. *Alcock* (2) that a lease or grant of a house, together with all lights thereto belonging or therewith used or enjoyed, is not a lease or grant of all light then actually falling upon the windows of the house, but only of such right to light as the lessor or grantor then had. That is to say, general words in a grant are to be restricted in equity as well as at law to that which the grantor had then power to grant."

Now it is said that there is in the present case an implied grant of light. In order to found that implication it is not sufficient to shew that the grantee got from the grantor a house

(1) [1902] 1 Ch. 926, 932. (2) L. R. 8 Ch. 663.

with windows looking over the adjoining land. The plaintiffs make no way towards founding that implication by the mere proof of that fact. For what is the implication which it is desired to set up? It is an implication that the grantor has granted the right to the access of light over land adjoining to the land which is granted, and unless he was in a position to grant expressly the passage of light over land of his own there can be no implication. If the land adjoining the obstructed window did not belong to the grantor; if the grantee who complains of the obstruction cannot prove that the adjoining land belonged to the grantor, he does not found any basis for an implication of a grant of light by the grantor. The solution, therefore, of the present case really lies in the true appreciation of what is the basis of an implication of a grant of light. As I have said, the implication must rest upon the ascertained facts as to the interest of the grantor in the land out of which he is supposed to make the grant of an easement constituting that land the servient tenement.

Have then the plaintiffs (and the onus is upon them) shewn that the defendant, who, they say, has granted them this easement, was himself in a position to grant it? What they do shew is this—that the defendant by virtue of an agreement with the Ecclesiastical Commissioners had a right to enter upon a tract of land belonging to them, which they had laid out for the purposes of a building scheme, and he undertook an obligation to cover that land with houses built upon plots laid out by the Commissioners according to plans to be approved by them and of dimensions the maximum and minimum limits of which were fixed by the terms of his bargain. The agreement further provided that, unless and until the defendant had conformed to all the conditions imposed by the Commissioners as to the building of the houses and the approval of plans by them—unless and until he had completed in each case a house upon the particular plot—he was not entitled to and did not acquire any interest in the land—that is, he did not become a tenant. Then and only then was he entitled to demand a lease either to himself or his nominee. That was the whole extent

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of his interest in the land adjoining that on which the plaintiffs' house was built.

When the defendant made the grant to the plaintiffs he had completed the house which he sold to them, and he had obtained a lease of it in accordance with the form imposed upon him by the agreement; he had taken the lease in his own name, and from him the plaintiffs bought the house.

Now where is the foundation for the implication of a grant of lights by the defendant to the plaintiffs on the sale of this house? The defendant's interest in the adjoining plot was, as I have pointed out, only that which he had under his agreement with the Commissioners, and, unless that agreement enabled him to make that plot servient to an easement of light passing over it, there could be no grant of the easement by him and no implication of a grant.

When you examine critically the defendant's position in regard to this adjoining land, it seems to me obvious that he could not, if he would, have granted a right to the passage of light over that land. He himself had then at the most a kind of licence, coupled with an interest in the land, which could not ripen into ownership until he had actually completed the building upon the land. In other words, he could not acquire a sufficient interest in the adjoining land to enable him to grant any right to light over it until he had, under the terms of his bargain with the Commissioners, himself created an obstruction to the passage of light over it. He was bound to build a house on the adjoining land and, in this particular case, opposite to the windows in respect of which the complaint is made. No doubt the agreement with the Commissioners did give him a certain margin of choice—that is, it rested with him to lay his plans before the Commissioners; but he was hampered by certain conditions. Within those conditions, however, he had, I suppose, a discretion as to the exact dimensions of the house the plans of which he was about to submit for their approval. It was contended that, that being so, the defendant was under an obligation to submit to the Commissioners with reference to the adjoining plot of land only the plan of such a house as would

in the least degree admissible interfere with the access of light to the plaintiffs' house. But where is that obligation to be found? Certainly not in any contract. Whence is it derived? It can only be derived from the implication which arises from the fact that the defendant had sold a house with windows in it to the plaintiffs. The nature and extent of that implication can only be ascertained by introducing all the rights and obligations of the defendant under the agreement with reference to the adjoining land. The implication must be measured in view of all those rights and obligations, and they include the right of tendering for the approval of the Commissioners the plans of a house to the full extent of that which is now in question.

Therefore it seems to me that the plaintiffs' case fails in limine, because the basis of it negatives the inference of a grant of light to any larger extent than that which is compatible with the full enjoyment and performance of all the rights and obligations which are contained in the building agreement. The inference of implication must be measured on the footing that all those rights and obligations were carried out. Therefore it seems to me that the case breaks down in its initial stage, and it is not necessary to follow it further.

There could, in my judgment, under the particular circumstances of this case, be no implication of any right to the access of light over the adjoining land—no implication of a grant made by a person who was in a position to make it. There being no right to the access of light, there can of course be no claim to damages or to an injunction in respect of the interference with light.

In my judgment the appeal must succeed.

ROMER L.J. I am of the same opinion. The judge decided this case on the view that the defendant was in the position of a person who had covenanted not to build on the adjoining land so as to obstruct the access of light to the plaintiffs' house. If the defendant had been in that position, no doubt the judgment could have been supported. But in fact the defendant was not in that position; he had entered into no such covenant, express or implied. And, indeed, the

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counsel for the plaintiffs did not attempt to base their case on such a covenant. They based their case on the doctrine that a grantor shall not derogate from his own grant, and they said that what the defendant had been doing was a breach of that doctrine, so as to make him liable to the plaintiffs in damages. The rules governing a grant of light are now well settled, so far as they are relevant to the present case. Even when you do not find the word "lights" expressly mentioned in a grant of land with houses on it yet, since the Conveyancing Act, 1881, you must no doubt treat the grant as if the word "lights" had been expressly mentioned, so that in that sense it must always since the Act be taken that there is an express grant of "lights." But that will carry us no further as regards the question which we have now to consider. For on the face of the deed itself you cannot merely from the use of the word "lights" gather to what extent that word carries the grantee. There is nothing on the face of the deed which would enable you to say that the word "lights" implies any rights over adjacent land which is not conveyed. The case is very different from one in which a grantor, e.g., purports expressly to grant a right of way over adjoining land which he mentions. In such a case he would be bound by what he had attempted to do, whether he had or had not then a title to that adjoining land. And the present case is far different from one in which a grantor chooses to enter into an express covenant purporting to bind adjacent land, by which covenant he would be bound, whether he had or had not then a title to that land. But otherwise that which passes by the use of the word "lights" is only a general right to light, and the extent of the right must be ascertained by inquiring into the circumstances existing at the date of the grant.

Now, in order to see whether a grant of light over the adjacent land is to be implied, you must inquire into two things. You must first inquire into the title to that adjacent land, to see whether the grantor has such an estate or interest in it as will support an implied grant by him of the right to the access of light over it. That inquiry is purely as to the title, and has nothing to do with the question whether the grantee

did or did not at the time of the grant know of the state of the title. For, if he did not know at that time of the state of the title, still, if he claims a right over the adjacent land, he was bound to take such title as the grantor had. He is in no better position than he would have been if he had inquired into the title to the adjacent land.

But, in my opinion, more than that must be inquired into in order to see what passed by implication by the use of the word "lights." In my opinion you are also entitled to inquire into the surrounding circumstances which are relevant to such a question—the circumstances affecting the two pieces of land, though this is not strictly a matter of title and might not appear on the title if it were inquired into. In order that the circumstances may be relevant they must, in my opinion, have been known to both the parties. But, if they are known to both, although therefore not strictly a matter of title, yet, in my opinion, those circumstances must also be considered in order to see whether there is or is not an implied grant of the right to light over the adjacent land.

Applying those principles to the present case, it is, to my mind, perfectly clear that the plaintiffs have no case. In the first place, on the mere question of the title to the adjacent land being looked into, it in itself negatives any possible implication of a grant by the defendant of the right to light over the adjacent land. And, apart from the question of title, the other circumstances which are in evidence, having regard to the findings of fact by the learned judge, are, in my opinion, also sufficient to negative any implication of a grant of the right to light over the adjacent land. On both those grounds, even if there are not others, I think that the plaintiffs ought not to have succeeded, and the appeal should be allowed.

COZENS-HARDY L.J. I am entirely of the same opinion, and I have very little to add.

I decline to imply a grant of light as against a man who could not have made an express grant of light over the land. The point seems to have been very clearly put by Bowen L.J.

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in *Birmingham, Dudley and District Banking Co.* v. *Ross* (1), where he pointed out that the obligation relied upon is not one "which arises simply from the interpretation of the deed as read by the light of the circumstances outside. It is a duty that arises from the outside circumstances having regard to the relation of grantor and grantee which the deed creates. Supposing you take the deed alone, no amount of construction could evolve from the deed itself the protection which the grantee of the deed desires. It does not appear from the deed that the grantor had the power of giving the protection which is necessary for the enjoyment of that which he grants; it is only by looking outside the deed that you see that such a power of protection on the part of the grantor in favour of the grantee exists." Here we find that the defendant had no more power to grant the right of light over the adjoining land than if it had been land altogether outside the building agreement, over which he never had any licence, right, or title whatsoever.

On this ground alone, not in any way differing from what my brother Romer L.J. has said on the other part of the case, I think it is quite clear that this appeal ought to succeed.

Solicitors: *J. E. Hetley*; *W. S. Barnes.*

(1) 38 Ch. D. 295, 314.

W. L. C.

DOUGHTY *v.* LOMAGUNDA REEFS, LIMITED.

C. A. 1903 March 17

[1902 D. 79.]

Company—Memorandum of Association—Power to sell Undertaking for Shares in another Company—Agreement to sell Undertaking for Shares in New Company—Resolution approving Agreement and Resolution for Voluntary Winding-up passed contemporaneously—Validity of Agreement—Rights of Dissentient Shareholders—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

APPEAL by the plaintiff from the decision of Buckley J. (1)

G. F. Hart, for the plaintiff.

Astbury, K.C., and *J. W. M. Holmes*, for the defendant company.

THE COURT (Collins M.R., Romer and Cozens-Hardy L.JJ.) dismissed the appeal without expressing any opinion as to the rights of the parties, on the ground that, in the absence of the new company, who were parties to the agreement for sale, it would be impossible to set aside that agreement or to declare it to be invalid.

[The plaintiff declined to incur the expense of bringing the new company before the Court by amendment.]

Solicitors: *Michael Abrahams, Sons & Co.; Ingle, Holmes & Sons.*

(1) [1902] 2 Ch. 837.

W. L. C.

KEKEWICH J.

1903

Feb. 9.

In re INNES & CO., LIMITED.

[00348 of 1901.]

Company — Winding-up — Contributory — Fully paid shares — Want of Consideration—Private Company—Gift of Shares—Ultra Vires.

Two brothers, who carried on the business of working a patent in partnership, arranged with six shipowners to form a private company to take over their business and patent rights in consideration of 6000*l.*, payable half in cash and half in shares; and it was resolved that the capital of the company should be 25,000*l.*, divided into 2500 shares of 10*l.* each, which were to be distributed as follows: The six shipowners were to take fifty shares apiece, and pay for them in cash for the purpose of raising the 3000*l.* payable in cash to the vendors, and the vendors were to take 300 fully paid shares as the balance of their purchase-money. Of the remaining 1900 shares, each of the six shipowners was to take 300 fully paid shares for his own benefit, and 100 fully paid shares were to be placed in the joint names of three of the shipowners, who became directors of the company, to be applied in rewarding persons who should bring business to the company. The company was incorporated, and the only shareholders were the vendors and the six shipowners. In order to give effect to the above arrangement, an agreement was entered into between the vendors and the company whereby the vendors purported to sell their business and patent rights to the company for 25,000*l.*, as to 3000*l.* in cash and as to 22,000*l.* by the allotment to the vendors or their nominees of 2200 fully paid shares, and this agreement was duly registered. The shares were allotted on the nomination of the vendors in accordance with the antecedent arrangement. Upon a summons by the liquidator in the winding-up of the company against the three shipowners who were directors to render them liable as contributories:—

Held, that the agreement between the company and the vendors was a sham, and that the shares were allotted, not in pursuance of that agreement, but in pursuance of the antecedent arrangement; that the allotment of the 1900 shares was made without consideration and was ultra vires; and that the respondents were liable as contributories for the full amount of the shares respectively allotted to them.

THIS was a summons taken out by the liquidator in the winding-up of Innes & Co., Limited, against the directors of the company, Messrs. Cockerline, Samman, Hagerup, and Robert Innes, in effect for a declaration that the three first respondents were liable as contributories for the full amount of

certain shares in the company allotted to them respectively as fully paid up; and, in the alternative, for a declaration that all the respondents were jointly and severally liable as directors for having paid away the capital of the company without any consideration.

The facts relating to the promotion of the company were not in dispute, and were as follows: Prior to the formation of the company, Messrs. Robert Innes and John Hepburn Innes carried on business at Kingston-upon-Hull as paint manufacturers, and they were the owners of a patent for a method of preventing corrosion in steam boilers. Their business was not prosperous, and they were in want of capital, and in 1899 they decided to get up a company to take over their business and their patent rights. Accordingly they approached Messrs. Cockerline, Samman, and Hagerup, who were shipowners, with this object, and eventually entered into an arrangement with them and three other gentlemen, who afterwards became shareholders of the company, that the property should be sold to a company to be formed for 6000*l.*, payable as to 3000*l.* in cash and as to 3000*l.* in shares, and that a company should be formed for that purpose with a capital of 25,000*l.*, divided into 2500 shares of 10*l.* each. The capital of the company was to be distributed as follows: Messrs. Cockerline, Samman, and Hagerup, and the other three gentlemen were to take fifty shares apiece and pay for them in cash. That absorbed 3000*l.*, which was to be applied in paying Messrs. Innes that part of the purchase-money which was payable in cash. The Messrs. Innes were to take between them 300 fully paid shares as the balance of the purchase-money. That absorbed another 3000*l.* Then, each of the six gentlemen above referred to was to take 300 fully paid shares for his own benefit, and 100 fully paid shares were to be placed in the joint names of Messrs. Cockerline, Samman, and Hagerup to be distributed as occasion required by way of reward to shipowners and others who might bring business to the company. This accounted for the remaining 19,000*l.* of capital. The company was incorporated on December 7, 1899. It was launched as a private company. The only shareholders were the two Messrs. Innes, Messrs.

KEKEWICH J.

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INNES & CO., LIMITED, *In re.*

Cockerline, Samman, and Hagerup, and the three other gentlemen above referred to, and the respondents were the directors. No prospectus was issued, and there was no intention to issue shares to the public or to any other person, and no shareholder ever parted with any of his shares. In order to give effect to the arrangement above stated an agreement, dated March 23, 1900, was entered into between the Messrs. Innes, thereinafter called the vendors, and the company, whereby the vendors purported to sell their business and patent rights to the company for 25,000*l.*, as to 3000*l.* in cash and as to 22,000*l.* by the allotment to the vendors or their nominees of 2200 fully paid shares in the company; but the agreement did not shew how these shares were to be dealt with. This agreement was registered on March 28, 1900, and the shares were in fact allotted on the nomination of the vendors in accordance with the antecedent arrangement above stated. The effect of this arrangement was to leave the company without any working capital, and business was carried on by means of money borrowed by the directors from the company's bankers under their guarantee. In November, 1901, the company went into voluntary liquidation, and on January 6, 1902, an order was made for the continuation of the winding-up under the supervision of the Court. The assets of the company had been sold for somewhat less than 500*l.*, and the debts of the company, including the liability to the bank, amounted approximately to 5000*l.*

The liquidator sought to make each of the respondents Cockerline, Samman, and Hagerup, liable as contributories for the full amount of the 300 shares which he had received as fully paid up, and to make them jointly liable in respect of the 100 shares placed in their joint names; and, in the alternative, to make all the respondents jointly and severally liable on the ground of misfeasance.

The respondents, against whom no imputation of fraud was made, took up the position that, inasmuch as they had obtained the concurrence of all the shareholders, they were justified in distributing the capital of the company in accordance with the arrangement which had been entered into.

Gore-Browne, K.C., and *W. H. Cozens-Hardy*, for the applicant. The vendors sold their business for 6000*l.*, payable as to 3000*l.* in cash and as to 3000*l.* in shares, and the rest of the capital of the company, 19,000*l.*, was divided amongst the six shareholders other than the vendors without any consideration whatever. No doubt they believed that they were justified in inflating the capital in this way; but the result was that the company never had any working capital at all, and the creditors were injured. Each of the six shareholders was to receive 300 shares for his own benefit, and the remaining 100 were allotted to the respondents other than Innes, to be given to those who introduced business to the company. The respondents are the directors of the company. We say, first, that the respondents are liable as contributories for the full amount of the shares, because they have not paid for them either in meal or in malt; secondly, that they are liable as directors for having accepted presents out of the capital of the company; and, thirdly, that they are liable for having paid 25,000*l.* for property known to be worth only 6000*l.* No doubt Innes cannot be made liable under the first head, and there may be a difficulty in making him liable at all. Upon the first point it is clear that the three remaining respondents have received 300 shares apiece without paying anything for them, for by their own admission the property had been acquired for 6000*l.* It is true that the agreement of March 23, 1900, was registered, but the registration of the agreement does not relieve the shareholders from payment; it only enables payment to be made otherwise than in cash: *Chapman's Case* (1); *In re Almada and Tirito Co.* (2); *In re Wragg, Limited.* (3) The last case decided that, except where the consideration was clearly colourable or illusory, it was not open to the liquidator to impeach the adequacy of the consideration, unless he was in a position to impeach the contract. Conversely, if the consideration is purely colourable and illusory, the adequacy of the consideration may be considered without the necessity of impeaching the contract. If, as here, the transaction is purely illusory, with the obvious

(1) [1895] 1 Ch. 771. (2) (1888) 38 Ch. D. 415, 423.
(3) [1897] 1 Ch. 796, 830, 835.

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result that the company is enabled to issue its shares at a discount, the Court will refuse to give effect to it: *Ooregum Gold Mining Company of India* v. *Roper*. (1) Here each of the three respondents other than Innes has received 3500*l.* worth of shares for which he has paid 500*l.* That is issuing shares at a discount within these decisions; and if this is to be regarded as the issue of shares at a discount, the concurrence of every single member of the company does not make any difference, because that is a transaction ultra vires the company. The result is that each of these three gentlemen is liable for the full amount of the 300 shares which he has received for nothing, and that they are jointly liable for the 100 shares issued to them jointly.

Secondly, assuming that these shares are to be treated as fully paid up, then the respondents are liable on the ground of misfeasance (and that alternative would include Innes), for directors cannot make presents to themselves out of the company's assets: *In re George Newman & Co.* (2); and as against a misfeasant it is assumed, in the absence of evidence to the contrary, that the shares are worth their full nominal value: *McKay's Case* (3); *In re Carriage Co-operative Supply Association.* (4)

Upjohn, K.C., and *A. H. Jessel*, for the respondents. The Messrs. Innes were patentees; they had no capital and no goodwill. The shipowners brought in capital and connection. There was no disappointment of creditors, because the agreement filed shewed the true state of the facts. The 25,000*l.* represented partly the patents and partly the business connection of these promoters. It matters not at what sum the capital was fixed, since all the shareholders were parties to the transaction, and no single share was ever dealt with. That being so, the only effect of their inflating the capital is to produce a change in the character of their own shares. This case falls within the principle of *In re Ambrose Lake Tin and Copper Mining Co.* (5); *In re British Seamless Paper Box Co.* (6);

(1) [1892] A. C. 125, 137.
(2) [1895] 1 Ch. 674.
(3) (1875) 2 Ch. D. 1.
(4) (1884) 27 Ch. D. 322, 332.
(5) (1880) 14 Ch. D. 390.
(6) (1881) 17 Ch. D. 467.

Salomon v. *Salomon & Co.* (1) It is said first that we have never paid at all for the shares and are liable as contributories; but that is contrary to *Carling's Case* (2), because these shares were not allotted to us in pursuance of any contract by the directors, but were allotted on the nomination of the vendors. Further, these gentlemen cannot be placed upon the list of contributories, because they never agreed to take shares upon the terms of paying for them: *De Ruvigne's Case* (3); and upon this point it is no answer to say that the transaction was ultra vires. In substance the liquidator is asking to rectify the agreement by inserting 6000*l.* instead of 25,000*l.*; but it is too late to do that now, because the property has been sold, and there can be no restitutio in integrum.

KEKEWICH J., upon the conclusion of the arguments on behalf of the respondents upon the question of their liability as contributories, intimated that he would dispose of that point before hearing the case of misfeasance, and he then gave judgment as follows:—

I asked Mr. Upjohn to postpone his argument on the misfeasance point, because I am by no means sure that these gentlemen could be made liable on that ground, and even then I am by no means sure that any practical result would follow. I will now deal with the other point—namely, that these gentlemen are liable to be placed on the list of contributories. To my mind it is almost a novel point; but having followed the arguments and grasped the facts, and having made up my mind, I think that no good would result from my postponing my decision.

The bare facts are as follows: The Messrs. Innes had a business to sell. It was a business for working some patents, they were not able to work the patents themselves, and there was admittedly no goodwill. Accordingly they entered into negotiations with certain gentlemen for the formation of a company to take over the business. They made an arrangement with these gentlemen. I avoid calling it an agreement

(1) [1897] A. C. 22, 57. (2) (1875) 1 Ch. D. 115.
(3) (1877) 5 Ch. D. 306.

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lest it should seem to be treated as an agreement for the sale of property to a company which was then not yet incorporated. There was nothing of the kind. The vendors entered into an arrangement with these gentlemen that the property should be sold to the company when formed—that is to say, that the property should be sold, and that the company should be formed to take the place of the purchaser, for 6000*l.*, of which 3000*l.* was to be paid in cash and 3000*l.* in fully paid-up shares of the company which was to be formed. That price was fixed as being in the opinion of the vendors the maximum which they could reasonably hope to obtain, and as being in the opinion of the gentlemen who were to form the company the proper price to pay. Having done that, a company was formed and an agreement was entered into to which I will shortly refer. As I understand the evidence, it was thought quite right and fair that the company should be made to pay a very much larger sum than this 6000*l.*, and that no harm would be done if the company only paid in shares, and if those shares were allotted to the gentlemen who were to benefit by the formation of the company. They took the shares for their own benefit, and they say in the plainest possible language that they saw no impropriety in agreeing to take the shares in that way and dealing with them as they thought fit.

Now this case has very properly not been opened as a case of moral fraud. Nobody suggests that these gentlemen deliberately, or even on the spur of the moment, sought to rob the company and get money into their own pockets which they had no right to. They are entirely acquitted of any immoral purpose of that kind. But it may be that, notwithstanding their honest intent, their conduct amounts to that which the law regards as fraud. They carried out the arrangement to which I have referred in this way. The vendors agreed to sell to the company, which must be taken to be represented by the three directors who are now before me, and the other three gentlemen who are not before me, for 25,000*l.*, and that was to be payable under the agreement as follows: "As to 3000*l.* in cash on completion, and as to 22,000*l.* by the allotment to the said vendors or their nominees of 2200 shares of 10*l.* each credited as fully

paid up in the capital of the company, to be numbered 1 to 2200 inclusive." That allotment did not cover the 3000*l.*, which was to be paid in cash and which was to be raised by the allotment of 300 shares to those who were willing to pay for them in cash. The six gentlemen I have mentioned shewed their full faith in the concern and their honest intention by subscribing for the 300 shares and paying 3000*l.*, which was handed over to the vendors. But the other shares were left to be allotted as the vendors thought fit to their nominees, and as a matter of fact, after keeping 300 shares for themselves, the remaining shares were all allotted to these six gentlemen. I leave out of consideration 100 shares which were to be allotted to Mr. Cockerline, Mr. Samman, and Mr. Hagerup jointly, apparently that they might have something in hand for those who brought business to the company. As regards all the others they were, on the nomination of the vendors, allotted immediately without any intervention to these six gentlemen. In order to simplify the matter, I will take the case of Mr. Cockerline. He had 300 shares allotted to him on the nomination of the vendors, and for these he paid nothing and was intended to pay nothing. The question is whether, having got those shares, he is entitled to say that though he has paid nothing for them he can hold them as fully paid up and is not to be liable as a contributory. There is a great deal to be said in his favour, and everything that could be said in his favour has been strongly urged by Mr. Upjohn; but the one point that presses me is that this agreement was a sham. Again, I desire to be understood as acquitting these gentlemen of moral dishonesty. They did not know that they were doing anything wrong; but that does not make their conduct to my mind less wrong, and it does not alter my view of the character of the transaction. These gentlemen were parties to the arrangement which provided that this property was worth to be sold to a company 6000*l.*, half in shares and half in cash. It does not lie in their mouths to say that the vendors insisted or could have insisted on a single penny more. The object of the increase from 6000*l.* to 25,000*l.* (leaving out of sight the odd 100 shares) was to put all those shares into the control

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of these six gentlemen for their own benefit; and it seems to me that issuing the shares to them immediately or mediately could be nothing less than a sham. In other words, the value of the property was fixed at 6000*l.*, payable half in shares and half in cash. That being so, there was no value beyond that at all, and the directors knowingly paid away a larger sum in shares for nothing. They gave what apparently has turned out to be valueless for that which they must have known to be valueless. It seems to me that they could no more do that than they could have agreed to allot the shares for 90 per cent. or 80 per cent., or any other sum below their par value. In fact, if once it is admitted that you cannot issue shares except for the full price, you only reduce the proposition to its extreme limit by saying that you cannot issue them for nothing. That is what it seems to me they did. The directors, with the assistance of the vendors, issued and allotted these shares to themselves for nothing, because there was nothing to represent them. That seems to me to be the solution of the question.

There are two or three arguments which I wish to notice. First, it is said, and there is ample authority for it, that the Court will not interfere with the estimate which is placed by vendors upon the property which they have to sell—that, putting aside dishonesty, if a mistake is made and a property is sold for 50,000*l.* which is not worth 5000*l.*, yet if that is the estimated value you cannot go behind it. I think there is one case in which an estimate which the Court thought to be exorbitant was held to be right. The answer to that is that there is no estimate here at all except for 6000*l.*, and that this agreement, which I repeat is a sham, cannot be treated as fixing the price at all.

The next point is this—that everybody concurred. Quite true. The company consisted of the signatories to the memorandum of association. They were all parties to this arrangement. They are all bound by it, and in that sense the company is bound. But the cases to which I have been referred, and which establish this proposition, all deal with matters which are intra vires the company. If I am right in my view that these shares could not be issued in this way at all, that

is because the transaction was not intra vires the company; and the fact that the directors and the other shareholders all concurred in the arrangement does not enable them to say that that arrangement is good if it is not possible in law. That disposes of the argument to which I am now addressing myself.

Then there is another argument, which is based upon what was mentioned by James L.J., and also by Mellish L.J., in *Carling's Case.* (1) Mellish L.J. says (2): "The shares in question were not allotted in pursuance of any contract made between the directors and the particular director to whom the allotment was made, but Walker, being entitled to have paid-up shares allotted either to himself or to his nominees, desired that they should be allotted to particular directors as his nominees, and they were accordingly so allotted." I am asked to consider that what happened here is on those lines. As a matter of fact, no doubt the agreement was so prepared that all the shares were to belong to the vendors, and were to be allotted according to their nomination, and therefore they were not allotted direct to these shareholders, but they were allotted to them on the nomination of the vendors. That seems to me, upon the facts before me, not at all the case with which the Lords Justices were dealing. I repeat, the agreement with Messrs. Innes was that they were to have 6000*l.*, half in cash and half in shares. The agreement which is here expressed was for the benefit of the six gentlemen I have mentioned, that the shares might be allotted to them. It was always intended that they should have the shares, and never intended that the vendors should have them, and though there may be in words some difficulty in getting behind the agreement, which is of course not now sought to be set aside, still I think that I ought, on looking at the facts which are proved to me, about which there was no real doubt at all, to say that these shares were allotted, not in pursuance of that expressed agreement, but in pursuance of the arrangement made between these gentlemen and the vendors. It seems to me that they have not put themselves in a position to say that they are entitled to hold these shares as fully paid up.

(1) 1 Ch. D. 115. (2) 1 Ch. D. 128.

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Then it is said it is a great hardship upon them: they have entered into one contract, and they are sought to be bound by another; they entered into a contract to take fully paid-up shares, and they are sought to be bound by a contract to take shares on which nothing at all has been paid. But it is too late, to my mind, to make that argument of any effect in a case of this kind. As was said by counsel, they are no doubt entitled to shew that they paid in meal or in malt; but the answer is that neither in meal nor in malt, or in any equivalent, have they paid anything.

That being so, without at all impeaching the contract between the vendors and the company, it seems to me that I am bound to make these gentlemen liable as contributories in respect of these shares as having up to the present time nothing paid up thereon.

The three directors before me have 300 shares apiece, and, besides, they are holders of 100 shares jointly, and that holding of course imposes a different liability, though depending entirely on the same considerations. There will be a declaration that they are contributories liable to pay for their shares. The liquidator will have his costs as against these three directors. Mr. Innes will have no costs.

Solicitors: *Burn & Berridge; F. W. Hill.*

H. B. H.

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Jan. 22.

In re RAYER.
RAYER *v.* RAYER.

[1896 R. 497.]

Will—Construction—Gift of Annuities "without any Deduction except Legacy Duty"—Will made before passing of the Customs and Inland Revenue Act, 1888—*Republication by Codicil after passing of the Act—Succession Duty—Estate Duty—Customs and Inland Revenue Act*, 1888 (51 *Vict. c.* 8), *s.* 21—*Finance Act*, 1894 (57 *& 58 Vict. c.* 30), *s.* 9.

A testator by his will made in 1882 gave an annuity to H. for her life, and after her death (in the events which happened) he gave annuities to her three children, and charged all the annuities on his real estate, and directed that they should be paid "without any deduction except for legacy duty and income tax." By a codicil, made after the passing of the Customs and Inland Revenue Act, 1888, he made certain dispositions, and in all other respects confirmed his said will.

By the Customs and Inland Revenue Act, 1888, s. 21, legacy duty was abolished, and the duties under the Succession Duty Act, 1853, and certain additional duties, were made chargeable in respect of legacies (whether given by way of annuity or in any other form) charged on the real estate of any person dying after July 1, 1888.

The testator died in 1892. H. died in 1900; and thereupon estate duty and succession duty became payable in respect of the annuities given to her children, and the question arose who was liable to pay the same:—

Held, following *In re Champion*, [1893] 1 Ch. 101, that the effect of the codicil was to republish the will as from the date of the codicil:

Held, also, that the testator, when he republished his will, must be taken to have known that there was then no legacy duty; that it was a a case of falsa demonstratio; and that the testator intended the annuitants to pay that duty which at that date was in fact chargeable in respect of the annuities:

Held, further, that the estate duty was payable out of the testator's residuary personal estate.

THIS was an administration action in which a question arose as to who was liable for the estate and succession duties which became payable on the death of an annuitant under these circumstances.

The testator by his will dated August 10, 1882, devised his real estates to trustees for a term of 1000 years upon certain trusts; and, subject thereto, he gave an annuity of 250*l.* to his sister Frances Harmar for her life, and after her decease (in the events which happened) an annuity of 100*l.* to each of her

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children, all which annuities he charged on his said real estates; and, subject thereto, he devised all his real estates in strict settlement, and directed that all the annuities should be paid half-yearly, "without any deductions except for legacy duty and income tax"; and he bequeathed all his residuary personal estates to be held upon trusts similar to his real estates.

By a codicil dated July 12, 1888, the testator made certain alterations in his will (not material to the present case), and concluded: "In all other respects I confirm my said will."

The testator died on January 11, 1892, and his will was duly proved by his executors.

Frances Harmar died on July 22, 1900, leaving three children, each of whom then became entitled to an annuity of 100*l.* per annum.

On the death of Frances Harmar the Inland Revenue authorities claimed (1.) estate duty and (2.) succession duty in respect of the three annuities; and thereupon the plaintiff took out a summons to determine who were liable to pay the duties in question.

O. L. Clare, for the plaintiff, the first tenant for life under the settlement. Legacy duty would have been payable by the annuitants but for the Customs and Inland Revenue Act, 1888, s. 21 (1), which has substituted succession duty for legacy duty. But the testator republished his will by his codicil, which was made after the passing of that Act. He must be taken to have known the law. He intended the annuitants

(1) The Customs and Inland Revenue Act, 1888, s. 21, sub-s. 1, imposes additional duties to those chargeable under the Succession Duty Act, 1853; and sub-s. 2 enacts: "The duties chargeable under the Acts now in force for charging duties on legacies and shares of the personal estates of deceased persons shall not be levied and paid under such Acts in respect of any legacy payable or having effect or being satisfied out of or charged or rendered a burden upon the real or heritable estate of any person dying on or after the first day of July, 1888, or any real or heritable estate, or the rents or profits thereof, which such person shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any moneys to arise from the sale, mortgage, or other disposition of any such real or heritable estate, or any part thereof, but the duties under the Succession Duty Act, 1853, and the additional duties under this Act shall be levied and paid in respect of every such legacy (whether given by way of annuity or in any other form) as a succession to personal property."

to pay some duty. He must have been thinking of the Government duty, and intended the annuitants to pay the Government duty, whatever it might be. That would in this case include the succession duty at any rate, and perhaps the estate duty. There is no decision that legacy duty means or includes succession duty or duties at large. The nearest cases to the present case are: *In re Parker-Jervis* (1); *In re Lord Fitzhardinge* (2); *In re Maryon-Wilson.* (3)

Butcher, K.C., and *Sheldon*, for two of the annuitants. The testator lived for some years after the Act of 1888, and could not have intended to throw these new and heavier duties on the annuitants. As to estate duty, that is by s. 9 and other provisions of the Finance Act, 1894, a first charge upon the corpus of the estate, and payable out of the residuary personal estate. As to the succession duty: the testator no doubt intended the annuitants to pay the legacy duty, but the annuities were to be paid "without any deductions" except for legacy duty—that is, that they were to be free of all duties except the legacy duty. That duty was abolished by the Act of 1888, and it is submitted that the testator could not have intended the annuitants to pay the substituted and additional succession duties imposed by that Act, which are not only heavier in amount than the legacy duty, but payable by different instalments and at different times. The annuitants are, therefore, exempt from the payment of the succession duties.

Hewitt, for the third annuitant, argued to the same effect.

S. B. L. Druce, for defendant tenants for life in remainder and the residuary legatees, supported the plaintiff's contention.

Withers, for the trustees and also the ultimate tenant in tail in remainder.

O. L. Clare, in reply.

FARWELL J., after stating the facts and reading s. 21 of the Customs and Inland Revenue Act, 1888, continued as follows:— The effect of sub-s. 2 of s. 21 of the Customs and Inland Revenue

(1) [1898] 2 Ch. 643. (2) (1899) 80 L. T. 376.
(3) [1900] 1 Ch. 565.

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Act, 1888, was that the legacy duties therein mentioned ceased, and succession duties were substituted for them. What the result would have been if the matter had rested there, having regard to what has been said in other cases as to the effect of an Act of Parliament on the construction of a will made prior to the passing of the Act, it is not necessary for me to determine; but Lord Selborne in *Jones* v. *Ogle* (1) points out that in such a case the Act of Parliament does not usually affect the construction of the will. It may, however, in some cases affect the expression of the testator's intentions, as will be seen, for example, in the case of *In re Bridger* (2), a decision under the Mortmain Act of 1891. It is not necessary for me to determine what the effect would have been in the present case, because on July 12, 1888, that is to say, after the Act came into operation, this testator made a codicil by which, after making certain provisions which are immaterial, he expressly confirmed his will. The effect of confirmation is stated by North J. in *In re Champion* (3), affirmed in the Court of Appeal. He says (4): "It is settled by authority that the effect of such a phrase as 'I confirm my will in other respects' is a republication of the will, and, when under the old law, a testator had made a will which would merely pass the property he had at the date of it, and then by a codicil he confirmed and republished his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date. There is ample authority on this point"; and then his Lordship goes through all the old authorities. Therefore I have, I apprehend, to treat this case as though there had been simply a devise after the Act of these rent-charges or annuities with a direction in the words that I have read that they are to be paid without any deduction except for legacy duty. I pause here to observe that when the testator died, namely, on January 11, 1892, the succession duty, which had been substituted for legacy duty, was in fact more onerous

(1) (1872) L. R. 8 Ch. 192, 195.
(2) [1894] 1 Ch. 297.
(3) [1893] 1 Ch. 101.
(4) Ibid. 109.

than and was different in some respects from the legacy duty. There was a 1½ per cent. increase, which has since by the Finance Act, 1894, been merged in estate duty (but that was two years after the testator died), and the succession duty is payable by eight half-yearly instalments, and the legacy duty was payable by four equal yearly instalments; so that the duties are by no means identical. This variation would have caused me considerable difficulty if there had been no codicil confirming the will; but the joint effect of will and codicil is that I have a document directing payment of a rent-charge "without any deduction except legacy duty," made at a time when there was no duty called by that name, but another duty recently substituted for it called succession duty: these two duties are frequently confused the one with the other, even by the Somerset House authorities in their letters relating to the present case. Now it is an important principle in construing wills to give effect so far as possible to all the words used. I find here that the testator clearly expresses his intention that the devisees shall bear the burden of some duty, and I can give no effect to this expression of intention unless I regard "legacy" as falsa demonstratio; or unless I read "legacy" as equivalent to the succession duty substituted for legacy duty. It is open to me to do this, inasmuch as the word "legacy" is insensible, having regard to existing circumstances, and the words "legacy duty" and "succession duty" are frequently used as interchangeable. I should certainly defeat the expressed intention if I held that the devisees took free from all duty, and I accordingly answer the question by saying that the devisees of the rent-charges must pay the succession duty. The question of estate duty has not been seriously argued: it must of course be paid out of the residuary personal estate.

Solicitors for plaintiff: *Wood, Bigg & Nash.*

Solicitors for several defendants: *Withers & Withers; Clarke & Calkin; Woodcock Ryland & Parker.*

H. L. F.

FARWELL J.

1903

Feb. 18.

HART *v.* PORTHGAIN HARBOUR COMPANY, LIMITED.

[1902 H. 2347.]

Contract for Construction of Works—Plant and Materials on Premises—Temporary Works—Building Owner's Property.

The usual clause in contracts for the construction of works or for building leases, providing that all materials brought on the ground are to become the property of the building owner, must be construed as vesting the materials in the building owner, subject to a condition of defeasance if the builder completes the works. It is a security to the building owner for the performance of the work. If the contractor fails to complete he cannot recover the materials, although the building owner does not complete the works himself or by another contractor.

Ex parte Collins, [1902] 1 K. B. 555, distinguished.

On August 1, 1900, H. Sales Cook entered into a contract with the Porthgain Harbour Company for the construction of a tidal harbour at Porthgain in the county of Pembroke. The contract was contained in specifications and plans issued by the parties, and provided for payment for all work done according to a schedule of prices. No lump sum was agreed upon. The contract required the construction of a temporary dam to keep out the sea while the harbour was being excavated. The contractor had constructed this dam, and brought certain other plant and materials on the ground.

On April 30, 1901, the contractor mortgaged the materials of the dam and the said plant and materials to the plaintiff by a bill of sale, which was duly registered.

On June 7, 1901, a receiving order was made against the contractor, and on July 2, 1901, he was adjudicated bankrupt and a trustee was appointed.

On August 6, 1901, the trustees for debenture-holders of the company gave notice to the contractor's trustee in bankruptcy that they had taken possession under the powers of their trust deed of the property lately in the occupation of the company, and that the machinery, plant, and materials upon the works belonged to them. On August 30 a writ was issued in a

debenture-holders' action, and on October 9 a receiver was appointed. Judgment was obtained in this action on December 20, and in August, 1902, the property in question was sold under an order made therein.

On May 26, 1902, the plaintiff issued the writ in this action against the company and the trustees of the debenture-holders, claiming under his bill of sale the materials used in the construction of the dam, and certain loose plant and materials. Pleadings were delivered, but no further steps were taken in the action until January 15, 1903, when the writ was amended by adding the purchaser at the sale as a defendant.

The action now came on for hearing. It appeared that all moneys due to the contractor for work done before his bankruptcy, less retention moneys, had been paid; but these payments had left the company wholly without funds, and they had never attempted to complete the works themselves, or get them completed by another contractor.

The provisions of the contract on which the argument turned were as follows:—

"4. The contractor shall construct and maintain at his own expense all temporary works necessary and proper for the execution of the permanent works, and shall remove such temporary works when the same shall no longer be required, at his own expense, in such manner as the engineers shall direct."

"9. If the contractors shall at any time and from any cause fail to proceed properly, or with the requisite expedition, efficiency, and in such a manner as to satisfy the engineers that the works will be completed within the specified period, or if the contractors shall omit or fail to carry on the works in the complete and workmanlike manner intended by this specification, or shall refuse or neglect to comply with any orders or directions given him by the engineers, or shall in any other respect act contrary to the terms of the contract, or of this specification, the engineers may give written notice to the contractor stating the grounds of complaint against him, or what is required of him, and unless the contractor fully and entirely removes the grounds of such complaint, and does

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what is required of him within eight days of the date of such written notice, the company shall have power to enter upon and take possession of the works and of the materials, stocks, implements, and plant which may be in, upon, about, or connected with, the said works, and to complete such works by contract or otherwise, and the expense incurred in completing the works according to the true intent and meaning of the contract shall be a debt due from the contractor, and may be deducted from the amount of any moneys due to him or recovered from him or his sureties by action at law.

"10. In the event of the contractor becoming bankrupt or insolvent the company shall have full power, without giving any previous notice, to enter upon and take possession of and complete the works in the manner described in the last foregoing clause.

"11. The whole of the plant and materials brought on the ground by the contractor is to be marked with his initials in legible characters. All such plant and materials shall be considered the property of the company until the engineers shall have certified the completion of the contract, and no plant or materials shall be removed or taken away without the consent or order in writing of the engineers."

The engineers were named in the contract.

Sect. 18 provided for payment monthly for the work done according to certificates of the engineers, which were to be for the value of the work done, less a sum of 250*l.* and 10 per cent. of value to be deducted as retention money until 800*l.* was so retained, and continued: "The engineers shall have power to withhold any certificate if they think the works are not proceeding satisfactorily, or until any matter unsatisfactory to them is rectified; no payment being held to be legally due until the engineers shall have certified the completion of the contract."

Upjohn, *K.C.*, and *Beddall*, for the plaintiff. The dam was a temporary erection which the contractor was bound to remove on the completion of the works, and which must have continued to be his property or he could not have removed

it. It is not in the same position as materials to be used in the permanent works. Even if it is included in the word "materials" in clause 11, the company only acquired under that clause a special and limited property in the materials to enable them to complete the works. When they abandoned the works they lost the property. Clause 11 must be read together with clause 10, and the whole intention of the contract must be looked at. The contractor might become bankrupt when only 200*l.* worth of work was required to complete the harbour and the company had 800*l.* retention money in hand. In that case, if the plaintiff's contention is correct, the company could get another contractor to complete the works, pay him out of the retention money, and then, having got the whole of the works they contracted for, retain in addition the balance of the retention moneys and all the materials used in the temporary works. Such a result is absurd.

[FARWELL J. Are not these clauses inserted as a guaranty that the contract shall be performed, like the deposit on a contract of purchase? It has been held, even in the absence of a forfeiture clause, that a purchaser cannot recover the deposit if he fails to complete.]

Your Lordship is referring to *Ex parte Barrell* (1); but in cases of that class there was nothing in the contract to shew what the purpose of the deposit was. Here clauses 10 and 11 shew clearly that the materials only became the property of the company for a limited purpose. The transaction is a bailment, and if a bailee sells the bailment is at an end: *Fenn* v. *Bittleston*. (2)

Butcher, *K.C.*, and *Dunham*, for the defendant company. *Brown* v. *Bateman* (3) shews that a clause vesting materials such as this is not limited by a power of forfeiture. In *Reeves* v. *Barlow* (4) a similar clause was held to vest the materials absolutely. *Sumpter* v. *Hedges* (5) shews that a contractor, who fails to complete his contract, cannot, in the absence of a further contract, claim on a quantum meruit for work done.

(1) (1875) L. R. 10 Ch. 512.
(2) (1851) 7 Ex. 152.
(3) (1867) L. R. 2 C. P. 272.
(4) (1884) 12 Q. B. D. 436.
(5) [1898] 1 Q. B. 673.

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Ex parte Collins (1) is distinguishable. It was there decided that the clause as to materials in a building agreement did not vest the property in the owners of the land, because subsequent clauses negatived any such meaning.

[They were stopped by the Court.]

Ashton Cross, for the debenture-holders' trustees.

Herbert Jacobs, for the purchaser, disclaimed any interest.

Upjohn, K.C., in reply.

FARWELL J. (after stating the facts of the case and reading shortly the clauses above set out). The whole contract in fact is based on the theory that the Porthgain Harbour Company are to be put in possession of a completed pier, the only thing which would be of any use to them, and, although payments are to be made on account on certificates, no payment is to be legally due until the engineer has certified completion.

It is not necessary for me to consider whether, assuming the company had been in a financial position to find another contractor, or could themselves have completed the pier, the present plaintiff, as claiming through the contractor, could have recovered the moneys due for what he had done, or could in that case have recovered the plant and materials brought on the ground by him. I will assume for the sake of the argument that he could have done so. It seems to me that would not be an unreasonable construction. But assuming that is so, the question I have to determine is a very different one. The company never got a completed pier, which is what they were bargaining for, and they failed to get it by reason of the default of the contractor. Now this clause 11 appears to me to be inserted, amongst other things, for the purpose of securing to the company the due performance of the contract. In my opinion the true construction of the clause, "all such plant and material shall be considered the property of the company," is that it vests the property in the materials in the company at law subject to a condition that, when the engineer shall have certified the completion of the contract, the contractor shall be

(1) [1902] 1 K. B. 555.

at liberty to remove them. I think that is in accordance with the decision of the Court of Appeal in *Reeves* v. *Barlow* (1), although neither the words nor the decision were quite the same. There was in that case "an agreement by a clause in the ordinary building contract that all building and other materials brought by the builder upon the land shall become the property of the landowner," and there was no condition, nor anything in the way of a defeasance. Bowen L.J. says: "The contract was only to apply to goods when brought upon the premises, and until this happened there was no right or interest in equity to any goods at all. Upon the other hand, the moment the goods were brought upon the premises the property in them passed in law, and nothing was left upon which any equity as distinct from law could attach. No further performance of the contract was necessary nor could be enforced." Applying that statement here, the true view is that the materials have become the property at law of the company subject to this condition; and the condition has not been performed by reason of the default of the contractor.

Now it appears to me that the reasoning which is applied in two classes of cases, of one of which *Sumpter* v. *Hedges* (2) and of the other *Ex parte Barrell* (3) are examples, ought to be applied in this case. The head-note in *Sumpter* v. *Hedges* (2) is this: "The plaintiff, a builder, who had contracted to erect certain buildings on defendant's land for a lump sum, after he had done part of the work, abandoned the contract, and the defendant thereupon completed the buildings:—*Held*, that the plaintiff could not recover from the defendant in respect of the work which he had done as upon a quantum meruit, there being no evidence of any fresh contract to pay for the same." And the late Master of the Rolls (Sir Archibald Smith) says: "The law is that, where there is a contract to do work for a lump sum, until the work is completed the price for it cannot be recovered. Therefore the plaintiff could not recover on the original contract." Further, if a man makes a contract under which he hands over

(1) 12 Q. B. D. 436, 442. (2) [1898] 1 Q. B. 673, 674.
(3) L. R. 10 Ch. 512.

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his property to the person with whom he is contracting in such a way that it is to be treated as security for the due performance of the contract, and then he himself makes default in performing the contract, in my opinion it is not possible for him to say that he is entitled to recover such property when he is not able to shew that he has performed his part of the contract. That is in accordance with the case of *Ex parte Barrell* (1), where a man had paid a deposit on entering into a contract for the purchase of the real estate which contained no forfeiture clause, and his trustee in bankruptcy attempted to recover back the deposit; Mellish L.J. says: "It appears to me clear that, even where there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot have back the money, as the contract has gone off through his default." In my opinion these clauses are put in for the purpose, not merely of enabling the contract to be performed, but also as a due security for its performance. They are not mere machinery to enable the Porthgain Harbour Company, either themselves or by another contractor, to complete the performance of the contract, but they are also a security for the company that the work shall be performed; and the company are entitled to avail themselves of that security if, by the default of the contractor, the work is not performed at all. The case of *Sumpter* v. *Hedges* (2) is, I think, clearly distinguishable from the case of *Ex parte Collins* (3), because in that case, as was pointed out by Bigham J., there were words in the contract which rendered it plain that no property ever passed: that was a mere question of construction, and has no bearing on the present case. The result is, although I am sorry that the plaintiff should have lost the money which he lent on this security, it is impossible to give effect to his claim, and I must dismiss the action with costs.

Solicitors: *Batchelor & Cousins; Busk, Mellor & Norris, for P. A. A. Weston, Bristol; Nye, Moreton & Clowes; W. H. Newton.*

(1) L. R. 10 Ch. 512, 514. (2) [1898] 1 Q. B. 673.
(3) [1902] 1 K. B. 555.

J. R. B.

BUCKLEY J.
1903
Jan. 22, 28.

In re ELLENBOROUGH. TOWRY LAW *v.* BURNE.

[1902 E. 1182.]

Voluntary Settlement—Assignment—Expectancy—Receipt of the Property by the Settlor—Power of Trustees to call for Transfer.

The decision in *Meek* v. *Kettlewell*, (1842) 1 Hare, 464; (1843) 1 Ph. 342; 58 R. R. 137, that the voluntary assignment of an expectancy, even though under seal, will not be enforced by a Court of Equity, has not been overruled by *Kekewich* v. *Manning*, (1851) 1 D. M. & G. 176.

THIS was an originating summons taken out by the Hon. Emily Julia Towry Law in the matter of the estate of the late Lord Ellenborough and of a settlement dated December 22, 1893.

The settlement in question was a voluntary settlement by deed, executed by Miss E. J. Towry Law, by which she granted to trustees the real estate and assigned the personal estate to which she, in the event of the deaths of her brother and sister respectively in her lifetime, might become entitled under their respective wills or intestacies. At that time she had no property in the real or personal estate of her brother or sister, but she had an expectation that, owing to the state of their health, she might become entitled to their property. The sister died in 1895, and the settlor, Miss E. J. Towry Law, became entitled to and received a share of her estate, and handed it over to the trustees. The brother, Lord Ellenborough, died in 1902. Miss E. J. Towry Law became entitled to all his property; this she did not desire to transfer to the trustees, and she took out a summons to decide the question whether she could refuse to do so.

Astbury, K.C., and *Cordery*, for the applicant. At the time when Miss E. J. Towry Law executed the settlement she had no interest in her brother's and sister's estates: she had only a spes successionis. There was nothing in existence which she could assign; there was nothing which by s. 6 of the Real

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Property Act, 1845 (8 & 9 Vict. c. 106), was made assignable by deed. The settlement was, therefore, not a conveyance of any property, and the question is whether it operated as a covenant to convey. No doubt if it were for value it could be enforced in that way: Fearne on Contingent Remainders, 9th ed. p. 548. But it has been held by Wigram V.-C. in *Meek* v. *Kettlewell* (1), and by Lord Lyndhurst L.C. in the same case on appeal (2), that a voluntary assignment of an expectancy, even though under seal, will not be enforced by a Court of Equity. It is stated in White and Tudor's Leading Cases in Equity, 7th ed. vol. ii. pp. 850, 851, that that decision was overruled by *Kekewich* v. *Manning* (3); but we submit that that is a mistake. In *Kekewich* v. *Manning* (3) there was an assignment of property, not of an expectancy; the alienation was complete; and the settlement was only in part voluntary. This view is supported by *Re Tilt* (4), although the point was not argued, and *In re Parsons*. (5)

Buckmaster, K.C., and *W. G. Wrangham*, for the trustees of the settlement. It is said that equity will not assist a volunteer, and that, as the trustees cannot without the assistance of a Court of Equity compel the plaintiff to transfer the property to them, she must succeed on this application. But it must be conceded that if it is not necessary for them to apply to the Court they are entitled to enforce payment; and that depends upon the question whether this settlement operated as an assignment. For that purpose the question whether it was for value is immaterial. If there was an assignment, it did not fail to operate simply because there was no consideration. In this settlement there was an assignment of a future interest which passed the property: *Tailby* v. *Official Receiver*. (6) That shews that the trustees do not require the assistance of a Court of Equity. If this property were in the hands, not of the plaintiff, but of somebody else, the trustees could sue for it as assignees. Any claim against the property ought to be made on them, not on the plaintiff: *Kekewich* v. *Manning*. (3)

(1) 1 Hare, 464; 58 R. R. 137.
(2) 1 Ph. 342; 58 R. R. 146.
(3) 1 D. M. & G. 176.
(4) (1896) 74 L. T. 163.
(5) (1890) 45 Ch. D. 51, 57, 58.
(6) (1888) 13 App. Cas. 523, 543, 546.

Nothing remains to be done by the plaintiff to complete the transfer to us of her interest in the property.

Cur. adv. vult.

Jan. 28. BUCKLEY J. On December 22, 1893, there were living Charles, Lord Ellenborough, and Gertrude Edith Towry Law, brother and sister of the applicant upon this summons. They were entitled respectively to certain property absolutely. In their property the applicant had no property or interest of any kind. She had an expectation arising from the fact that, owing to the relationship between them and herself and to their state of health, she might be (as was subsequently the case) the survivor, and might under their respective wills or intestacies become entitled to their property. She had neither a future interest nor a possibility coupled with an interest capable of being disposed of under s. 6 of 8 & 9 Vict. c. 106. She had only a spes successionis, and that is not a title to property by English law: *In re Parsons.* (1) In that state of facts the applicant, on December 22, 1893, executed a voluntary settlement by deed by which she granted to the trustees, who are the respondents on this summons, the real estate, and assigned the personal estate to which the applicant, in the event of the death of her brother and sister respectively in her lifetime, might become entitled under their respective wills or intestacies. That deed could not operate by way of grant, but could in a Court of Equity operate as an agreement on the part of the applicant to grant and assign that which in fact could not by the deed be granted or assigned. The brother and sister are now dead, intestate, and the applicant has become entitled by devolution. The property coming to the applicant from her sister has been handed over to the trustees, and the applicant does not say that she can get it back. The property of the brother has not so been handed over, and the applicant does not desire to hand it over unless she is compelled to do so. The question to be determined upon this summons is whether she can be called upon by the trustees to assign and hand

(1) 45 Ch. D. 51.

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over to them that which has come to her by devolution from the late Lord Ellenborough, or whether she can refuse to do anything further to perfect that which was a mere voluntary deed. In order to raise the question in proper form a writ has been, or will be, issued by the trustees against the applicant seeking to recover the funds, and the order will be drawn up on this summons and in that action. The deed was purely voluntary. The question is whether a volunteer can enforce a contract made by deed to dispose of an expectancy. It cannot be and is not disputed that if the deed had been for value the trustees could have enforced it. If value be given, it is immaterial what is the form of assurance by which the disposition is made, or whether the subject of the disposition is capable of being thereby disposed of or not. An assignment for value binds the conscience of the assignor. A Court of Equity as against him will compel him to do that which ex hypothesi he has not yet effectually done. Future property, possibilities, and expectancies are all assignable in equity for value: *Tailby* v. *Official Receiver*. (1) But when the assurance is not for value, a Court of Equity will not assist a volunteer. In *Meek* v. *Kettlewell* (2), affirmed by Lord Lyndhurst (3), the exact point arose which I have here to decide, and it was held that a voluntary assignment of an expectancy, even though under seal, would not be enforced by a Court of Equity. "The assignment of an expectancy," says Lord Lyndhurst (4), "such as this is, cannot be supported unless made for a valuable consideration." It is however suggested that that decision was overruled or affected by the decision of the Court of Appeal in *Kekewich* v. *Manning* (5), and a passage in White and Tudor's Leading Cases in Equity, 7th ed. vol. ii. p. 851, was referred to upon the point. In my opinion *Kekewich* v. *Manning* (5) has no bearing upon that which was decided in *Meek* v. *Kettlewell*. (6) The assignment in *Kekewich* v. *Manning* (5) was not of an expectancy,

(1) 13 App. Cas. 523, 543.
(2) 1 Hare, 464; 58 R. R. 137.
(3) 1 Ph. 342; 58 R. R. 146.
(4) 1 Ph. 347.
(5) 1 D. M. & G. 176, 187.
(6) 1 Hare, 464; 1 Ph. 342; 58 R. R. 137.

but of property. "It is on legal and equitable principles," said Knight Bruce L.J., "we apprehend, clear that a person sui juris, acting freely, fairly, and with sufficient knowledge, ought to have and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced." The important words there are "of his property." The point of *Meek* v. *Kettlewell* (1) and of the case before me is that the assignment was not of property, but of a mere expectancy. On December 22, 1893, that with which the grantor was dealing was not her property in any sense. She had nothing more than an expectancy. In *Re Tilt* (2) there was again a voluntary assignment of an expectancy, and the point was not regarded as arguable. "It was rightly admitted" said Chitty J., "that as, when this plaintiff executed the deed of 1880, she had no interest whatever in the fund in question, which was a mere expectancy, the deed was wholly inoperative both at law and in equity, being entirely voluntary." By "wholly inoperative" there the learned judge of course did not mean that if the voluntary settlor had handed over the funds the trustees would not have held them upon the trusts, but that the grantees under the deed could not enforce it as against the settlor in a Court of Equity or elsewhere. In my judgment the interest of the plaintiff as sole heiress-at-law and next of kin of the late Lord Ellenborough was not effectually assigned to the trustees by the deed, and the trustees cannot call upon her to grant, assign, transfer, or pay over to them his residuary real and personal estate.

Solicitors for all parties: *Burgess, Taylor & Tryon.*

(1) 1 Hare, 464; 1 Ph. 342; 58 R. R. 137. (2) 74 L. T. 163.

H. C. R.

BUCKLEY J.

1903

Feb. 4, 5.

In re ROMAIN.

[1902 R. 1258.]

Costs—Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Sched. I., Part I., Rule* 11—*Purchase and Resale—Payment of Commission to Agent.*

F. and D. introduced certain property to L. for purchase by him, and introduced him to X., who shortly afterwards purchased from L. at an increased price. A commission was paid to F. and D. on each transaction. F. and D. also introduced L. to R., who, acting as the solicitor of L., concluded the contracts between the original vendor and L. and between L. and X. The property was conveyed direct from the original vendor to X., L. joining in the conveyance.

The abstract was sent to R., who copied it and forwarded it to the solicitors of X.; on receiving the requisitions he copied them and sent them to the original vendor's solicitors, and a similar operation took place with reference to observations and further requisitions on title:—

Held, that even if R. was employed to negotiate at all, he had not in substance entirely negotiated either the purchase or the resale, and, moreover, that commissions on both the purchase and resale had been paid to agents within the meaning of rule 11 of Sched. I., Part I., to the Order under the Solicitors' Remuneration Act, and that therefore the scale fee for negotiating a purchase or sale was not chargeable:

Held, also, that the scale fees (*a*) for investigating the title and preparing and completing the conveyance on the purchase, and (*b*) deducing the title and perusing the conveyance on the resale, were not chargeable.

In re Read, [1894] 3 Ch. 238, distinguished.

On February 19, 1902, Finkelstein and Diamont told one Barnett Levy that certain houses at the east end of London could be bought, and that they thought the property could be resold at a profit, and on the same day Levy gave them a commission note, which was as follows: "I, the undersigned, agree to pay a commission of 75*l.* to J. Finkelstein and Morris Diamont for introducing thirteen freehold houses. Should I buy the above-mentioned property, the commission should be paid on date of completion. The property situated Splidt Street, Back Church Lane." The result was that Levy put himself into communication with Matthews, Matthews & Goodman, the estate agents who had the matter in hand, and

from a letter from them dated February 19, 1902, it appeared that 100*l.* was to be deposited, and that Matthews & Co. were to consult their clients as to whether they would accept an offer which Levy had made. Mr. Romain, solicitor, was first consulted on February 24, on which day Finkelstein and Diamont took Levy to Romain's office. The purchase was ultimately arranged on March 4, on which day Levy went to Matthews & Co.'s office, and took Romain with him to assist him (at the suggestion of either Finkelstein or Diamont) as he did not himself understand English very well, and there, he himself, in Romain's presence, bid 50*l.* more than another offer of 3300*l.* which had been obtained, and as the result of that Levy agreed to purchase for 3350*l.* In the meanwhile Finkelstein and Diamont had introduced the matter to A. Davis with a view to his becoming a sub-purchaser, and the commission note of February 19 was replaced by another arrangement. Levy paid 10*l.* in respect of the 75*l.*; and on February 26 he gave to Diamont another commission note, whereby he agreed to pay Diamont 45*l.* commission in reference to the property; and this document was given and accepted in satisfaction, so far as Diamont was concerned, of the original commission note. Levy then promised Finkelstein another commission note, which, in pursuance of his promise, he ultimately gave him on March 6, after the resale had been made. This note was as follows: "I, the undersigned, to pay to J. Finkelstein a commission of 35*l.* for introducing a purchaser for my property situated in Splidt Street, Commercial Road—thirteen freehold houses. Should the property be sold to my purchaser, A. Davis, the commission will be paid when the business is settled." The sale to Davis was arranged at an interview on March 5, with the assistance of Romain to a very limited extent. The sale was substantially arranged by Finkelstein and Diamont, who had introduced Davis to the matter, and were trying to persuade him to buy. Diamont in an affidavit said that he, Finkelstein, Levy, Romain, and Davis all met "at Mr. Romain's the following day, namely, March 5, I having arranged the appointment. I brought Mr. Davis round to Mr. Romain's office; Messrs. Levy and Finkelstein were already there, we

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being about an hour late for the appointment. I opened the matter by discussing the price with Mr. Davis, Mr. Levy having told me before the meeting that the contract was signed, and he would ask and not take less than 3700*l.*, which sum Mr. Davis eventually agreed to pay." There was an affidavit by Davis, filed on behalf of Romain, which answered other parts of Diamont's affidavit, but did not answer the above paragraph.

Previously, but on the same day, Davis wrote to Romain that he had seen Finkelstein and Diamont, who seemed to be of opinion that Levy would accept 3600*l.* for the property. "This," the letter continued, "will leave him a profit of 250*l.*, which I am sure you will agree with me is a very nice profit on so small an outlay; so therefore treat our conversation of this morning as strictly entre nous, and if you can secure this property for me at 3600*l.* please do so."

Ultimately the whole property was conveyed by the vendors, Levy joining, direct to Davis.

The following items in Romain's bill of costs against Levy were objected to:—

Cost of negotiating the purchase by Levy, 31*l.* 15*s.*; costs of contract, investigating title, and completing purchase, 36*l.* 15*s.*; cost of negotiating the sale to Davis, 33*l.* 10*s.*; costs of contract, deducing title, and completing conveyance, 38*l.* 10*s.*

On taxation the taxing master allowed the above items, and Levy applied for a review of the taxation.

The applicant alleged that the abstract had been sent to Romain, who copied the same and forwarded it to Davis's solicitors; that on receiving the requisitions he copied the same and sent them to the original vendor's solicitors; and that a similar process took place with reference to observations and further requisitions on title. Mr. Romain alleged that he had done more than this. It was not disputed that he was entitled to charge for what he had done.

P. S. Stokes and *C. J. Mathew*, for Levy. The first question is whether the solicitor is entitled to charge the fee for negotiating, first, the purchase by Levy, and, secondly, the sale to Davis. We say that he is not entitled to charge

either fee. In the first place, the solicitor did not negotiate either the purchase or the sale. Secondly, if he did, under the General Order under the Solicitors' Remuneration Act, 1881, Sched. I., Part I., r. 11, the scale for negotiating does not apply unless "no commission is paid by the client to an auctioneer, or estate or other agent."

Finkelstein and Diamont having done part if not the whole of the negotiating and received commissions, the solicitor cannot charge the fee for negotiating: *In re Withall.* (1) In such a case he is only entitled to charge for a quantum meruit: *Drielsma* v. *Manifold.* (2)

Then the solicitor cannot charge the scale fee for acting for the purchaser by "investigating title" and "preparing and completing conveyance," or for acting for the vendor by "deducing title," and "perusing and completing conveyance," unless in either case he has done all the things enumerated: *In re Lacey & Son.* (3)

In one case of a sale and resale the two scale fees were allowed: *In re Read.* (4) But there only part of the property was resold, and therefore that case is distinguishable, "because in that case both transactions—the purchase and the resale—were carried out," as was pointed out by the Court of Appeal in *In re Baillie & Co.* (5)

H. S. Q. Henriques, for the solicitor. It is immaterial that the solicitor did not himself find the purchaser. In *In re Withall* (6) North J. says that the solicitor may earn the negotiation fee although the vendor brings the purchaser to him.

[BUCKLEY J. But here somebody else brought the purchaser; the vendor did not bring him.]

The fact that Finkelstein and Diamont introduced Levy to the solicitor does not prevent him from being entitled to the remuneration fee. The fact that the client has to, or in fact does, consult some one else is immaterial if the solicitor so far arranges the matter that the client has only to signify his

(1) [1891] 3 Ch. 8.
(2) [1894] 3 Ch. 100.
(3) (1883) 25 Ch. D. 301.
(4) [1894] 3 Ch. 238.
(5) (1899) 15 Times L. R. 277.
(6) [1891] 3 Ch. 12.

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acceptance of the offer: *In re Macgowan.* (1) If the Court holds that Finkelstein and Diamont took some part with reference to the purchase, they at any rate took no part with reference to the subsale.

As regards the other items, the present case is within *In re Read.* (2)

In *In re Baillie & Co.* (3) the subsale in respect of which the fee was disallowed was never completed.

BUCKLEY J. In this case I am unable to agree with the conclusion at which the taxing master has arrived. If the matter involved a question of detail, of which he has very much greater experience than I have, I should have more hesitation in differing from him than I have; but the question I have to determine is really one of principle arising upon the construction of these rules and the decisions upon them.

The bill to be taxed is a bill against a client, Mr. Barnett Levy, who purchased and resold certain houses somewhere in the east end of London. The solicitor in his bill charges the scale fee on negotiating the purchase, the scale fee on negotiating the sale, the scale fee upon investigating the title of the purchase, and the scale fee on deducing the title on the sale, and the question is whether he is entitled to do so.

Now if it were necessary to decide the point, I should upon the affidavits have very great doubt whether the solicitor in this case was employed to negotiate at all; but it is not necessary to determine that question, because even if he was employed to negotiate, I think the scale fee is not applicable for other reasons. As regards the original purchase, there is no question about this—that the purchase was introduced to the attention of Mr. Levy by Finkelstein and Diamont. [His Lordship stated the facts, and continued:—]

By the evidence I think it is quite plainly made out that Finkelstein and Diamont were persons who not only introduced the subject of the purchase to Levy, but during the period from February 19 to March 4 were interesting themselves in

(1) [1891] 1 Ch. 105. (2) [1894] 3 Ch. 238.
(3) 15 Times L. R. 277.

getting it through. The exact construction of the commission note of February 26 may be a matter of difficulty. Whether the commission of 45*l.* was payable for introducing the purchaser, or, if it were carried through, the resale to Davis, is open to doubt. It may be the latter, but it does not much matter. The 10*l.* was paid, and the note of February 26 was given and accepted, so far as Diamont was concerned, for the original note. There is no doubt what the commission note of March 6 was. It was a note, given in pursuance of a previous promise, that the commission would be paid if the sale to Davis went through. That sale was arranged on March 5—it may be with the assistance of the solicitor, but to a very limited extent—but it was substantially arranged by Finkelstein and Diamont, the persons who had introduced Davis to the matter and were trying to persuade him to buy. [His Lordship referred to Diamont's and Davis's affidavits, and continued:—]

The result of all this, as it seems to me, is, that even if the solicitor did take some part in the negotiating, he did not entirely conduct the negotiation—the most that he did was to do part of it. Having regard to those facts, I turn to the rule on which the questions are—rule 11 of the General Order, Sched. I., Part I.—which so far as material is as follows: "The scale for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate or other agent." Now, as Bowen L.J. pointed out in *In re Macgowan* (1)—in order that the scale fee for negotiating may apply—there are two things to be satisfied, first, affirmatively, the solicitor must arrange the things mentioned, and further, negatively, no commission must be paid by the client to an auctioneer, or estate or other agent. I think the solicitor in this case fails in the first instance upon the first part of that. I think he did not arrange the sale or purchase. As to what "arranging" means, I have the authority of the Court of Appeal in both *In re Macgowan* (1) and *In re Withall* (2) for saying that that means that the solicitor must "entirely conduct the

(1) [1891] 1 Ch. 105, 115. (2) [1891] 3 Ch. 8.

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negotiation." Those particular words are used by North J. in the latter case (1), and his judgment was affirmed by the Court of Appeal. I do not understand that to mean that he must entirely conduct it, in the sense that the vendor may not bring in the intending buyer and introduce him to the solicitor, and say to the solicitor, "Now please negotiate." If those were the facts, the solicitor might be said to have entirely conducted the negotiation; but I think that the solicitor does not negotiate if he is merely one of a body of persons who negotiate; he must be the person who does substantially the whole of the negotiation. Now assuming on this point that the solicitor was employed to negotiate—although I am not satisfied that he was employed to negotiate at all—then I am of opinion that he did not do the whole of the negotiation. He did not find the purchaser; he did not find the property when the purchase was made; he did not find the purchaser when it was resold; and he did not settle the negotiation in the matter of either one purchase or the other.

There is only one further fact which I want to mention. [His Lordship referred to the letter from Davis to Romain of March 5, and continued:—]

Two things are observable from that letter—that Finkelstein and Diamont were also persons negotiating with Davis, in the sense that they had been to him about the property and told him what they thought they would take for it, and that Davis was treating with Romain as Levy's agent to buy from him as if Romain was acting for the vendor in selling for the vendor.

Then the next point is this—that even if the affirmative words of rule 11 are satisfied, the negative words, "no commission is paid by the client to an auctioneer, or estate or other agent," are not satisfied. In respect of both the purchase and the resale, it seems to me that a commission was paid by the client to Finkelstein and Diamont, and that the solicitor is not entitled to the scale fee for negotiating either the purchase or the resale.

Then the next question is this: Did the solicitor investigate

(1) [1891] 3 Ch. 12.

the title and prepare and complete the conveyance when Levy purchased, and did he deduce the title and peruse and complete the conveyance when Levy sold? The facts are that, inasmuch as Levy had resold to Davis, the solicitor in fact did nothing at all but receive the abstract from the solicitors to Levy, hand it on to the buyer from Levy, and act in the same way with the requisitions when they came in. He did nothing at all besides this. The conveyance when prepared was a conveyance from Levy's vendor to Levy's purchaser; Levy was made a party to it for the purpose of introducing the sub-purchaser, the proper person to whom the vendor could convey. I am not at all saying that the solicitor is not entitled to some payment for those things. He had to see that it was a proper conveyance for his client to concur in; but did he, as regards the sale, investigate the title and prepare and complete the conveyance in the one case, and peruse and complete the conveyance in the other? He did not. It was held by the Court of Appeal in *In re Lacey & Son* (1) that, in order to earn the scale fee, the solicitor must do all those things so far as the contract requires it to be done. He must, if acting for the purchaser, investigate the title, prepare the conveyance, and complete the conveyance, or, if acting for the vendor, he must peruse the conveyance and complete the conveyance. Did the solicitor in this case do any one of those things? It appears to me that he did not. It is said that in *In re Read* (2) Kekewich J. held that a scale fee might be charged in circumstances in some respects similar to this. The essential difference it appears to me is this—that in the case before Kekewich J. the subsale was a subsale, not of the whole, but of part of the property included in the head sale. Therefore there was a conveyance in respect of the original purchase, and there was another conveyance in respect of the subsale. It may very well be that under those circumstances some scale fee may be payable, and it may be that the scale fee in respect of the whole original purchase-money may be payable. As to that I say nothing at all; but it appears to me that *In re Read* (2) has no application to a case where the subsale is a sale of the whole of

(1) 25 Ch. D. 301. (2) [1894] 3 Ch. 238.

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the property in the original sale, and therefore the solicitor of the intermediate purchaser has nothing to do with completing the sale to his client as distinguished from a subsale of part of the property by his client. *In re Lacey & Son* (1) was referred to by the Court of Appeal in *In re Baillie & Co.* (2), where the Court pointed out that *In re Read* (3) had reference to such a state of facts as I have mentioned.

It appears to me that the solicitor has not done that which he must do in order to earn the scale fee—that is to say, he has not done all the things in that definition. He must deduce the title, or prepare or peruse, as the case may be, the conveyance, and he must procure the completion of the conveyance. I must, therefore, send the matter back to the taxing master to be dealt with on the footing of this rule. As I understand, the client does not at all dispute that the solicitor is entitled to be paid a proper fee; and the order will be that the objection is allowed, and that the matter be referred back to the taxing master accordingly, and that the respondent be ordered to pay the costs of the summons.

Solicitors: *J. S. Blanckensee; D. A. Romain.*

(1) 25 Ch. D. 301. (2) 15 Times L. R. 277.
(3) [1894] 3 Ch. 238.

F. E.

In re EXCHANGE TRUST, LIMITED.

LARKWORTHY'S CASE.

[00257 of 1902.]

BUCKLEY J.

1903

Feb. 10.

Company—Articles of Association—Forfeiture of Shares—Rescission of Forfeiture.

The articles of association of a company provided that on non-payment of a call on shares the directors might forfeit the shares; that the forfeited shares should be the property of the company; that before the shares were disposed of the directors might "annul the forfeiture" upon such conditions as they thought fit; and that notwithstanding the forfeiture the shareholder should be liable to pay all calls, interest, and expenses owing in respect of the shares at the time of forfeiture.

The directors passed a resolution forfeiting the shares of L. for non-payment of a call, and gave him notice of the forfeiture. On demand L. paid the call, interest, and expenses, and at the same time wrote that he repudiated any further liability on the shares.

Nine months afterwards the directors passed a resolution purporting to rescind the forfeiture and giving notice to L. that he was registered in respect of the shares. L. replied declining to have his name reinstated as owner of the shares:—

Held, that the company had no power adversely to L. to reinstate him with the liability of a shareholder.

THE articles of association of the Exchange Trust, Limited, provided (20) that if any member should fail to pay any call on or before the time appointed for payment of the same the directors might serve a notice on him requiring him to pay the same; (21) that the notice was to state the time and place for payment, and that on non-payment the shares in respect of which the call was made would be liable to be forfeited; (22) that if the requisitions of the notice were not complied with the shares might "be forfeited by a resolution of the directors to that effect."

Arts. 23 to 25 were as follows:—

"23. Any shares so forfeited shall be deemed to be the property of the company, and the directors may sell, reallot, or otherwise dispose of the same in such manner as they think fit.

"24. The directors may at any time before any shares so

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forfeited shall have been sold, reallotted, or otherwise disposed of, annul the forfeiture upon such conditions as they think fit.

"25. Any member whose shares have been forfeited shall, notwithstanding, be liable to pay and he shall forthwith pay to the company all calls, interest, and expenses owing upon or in respect of such shares at the time of forfeiture, together with interest thereon from the time of forfeiture until payment at the rate of 10*l.* per cent. per annum, and the directors shall enforce the payment of such moneys or any part thereof, if they shall think fit, but shall not be under any obligation so to do."

F. B. Larkworthy held 250 shares in the company of 1*l.* each.

As he neglected to pay a call of 5*s.* per share and to comply with a notice sent in pursuance of arts. 20 and 21, the directors on August 1, 1901, passed a resolution forfeiting the 250 shares. On August 8, 1901, the secretary of the company wrote to Larkworthy telling him of the resolution and stating as follows: "The directors will proceed to reissue the said shares or deal with them in any manner that they may think fit, and meanwhile I am to remind you that you are still liable for payment of the call in question, notwithstanding that your shares have been forfeited."

On September 9, 1901, the company's solicitors wrote to Larkworthy asking for payment of 68*l.* 10*s.* 2*d.*, being 62*l.* 10*s.* in respect of the call of 5*s.* per share upon 250 shares "lately standing in your name in the books of the said company," and 6*l.* 0*s.* 2*d.* for interest thereon, and threatening proceedings unless the amount, with 5*s.* "our charge for this application," was not paid by September 11.

On September 16, 1901, Larkworthy replied inclosing cheque for 68*l.* 15*s.* 2*d.*, and saying, "I take this opportunity of repudiating any further liability on these shares."

On June 17, 1902, the secretary wrote to Larkworthy as follows: "I beg to give you notice that the directors have, by the power vested in them under clause 24 of the company's articles of association, rescinded the resolution of the 1st day of August, 1901, forfeiting your shares . . . . and that you now

stand on the register of shareholders for the number of shares you then held."

Larkworthy replied on July 17, 1902, saying that he declined to have his name reinstated on the register as the owner of the forfeited shares.

On August 7, 1902, the company confirmed as a special resolution a resolution for voluntary winding-up and appointing a liquidator.

The liquidator placed Larkworthy's name on the list of contributories as the holder of the 250 shares, and Larkworthy applied by originating summons in the winding-up that the list might be varied by excluding his name therefrom.

J. F. Waggett, for the applicant. After forfeiture the relation of company and member no longer exists. The person who held the share ceases to be a shareholder, and becomes merely a debtor to the company in respect of what was owing on the shares at the date of forfeiture: *Aaron's Reefs, Limited* v. *Twiss*. (1) The company could not annul the forfeiture so as to reinstate the liability of the shareholder without a new contract.

[He was stopped.]

Gore-Browne, K.C., and *Bonner*, for the liquidator. Forfeiture did not altogether determine the contract. The articles give the directors a clear power to annul a forfeiture, and do not require any assent from or contract with the shareholder, and when the forfeiture was annulled the applicant became again liable as a shareholder.

BUCKLEY J. (after stating the facts). Anything more conclusive for putting an end to the contract between the parties—as company and shareholder—than the letter of September 16, 1901, I cannot conceive. The company had in effect said, "If you do not comply with our demand for payment of the call, we will forfeit your shares." And the applicant not having so complied, the contract came wholly and entirely to an end.

The question I have to decide is whether, the contract having

(1) [1896] A. C. 273, 295.

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come to an end, the company could, adversely to the applicant, restore him, under art. 24, to the position of a shareholder. It seems quite plain to me that the company could do nothing of the kind. Power was given to the company by its articles to forfeit shares, and thereby to bring to an end the contractual relation which subsisted between the company and a shareholder, and to substitute a new obligation measured to some extent by the penal rate of 10 per cent. interest on the call in arrear. Art. 24 means this—that if after a forfeiture the shareholder is minded to come to a new contract with the company, retaking the shares which have been taken from him by forfeiture, the company gives to its directors power so to contract with him. The company has no power under art. 24 to do that adversely to the shareholder whose shares have been forfeited, so as to reinstate him in a liability of which he was relieved by the operation of forfeiture, except as regards so much of the liability as is preserved by art. 25. The sequel is amusing. The resolution purporting to annul the forfeiture having been passed on June 16, 1902, and communicated to the applicant on the following day, and the applicant having on July 17, 1902, stated that he declined to be reinstated as a shareholder, the company six days later gave notice of a meeting to pass a resolution for voluntary winding-up, which was confirmed as a special resolution on August 7; so that this was an attempt by the company on the eve of liquidation to reinstate in liability a shareholder whose shares it had previously forfeited. In my judgment the company was wrong. I therefore hold that the applicant is entitled to have his name removed from the list of contributories, and I order the respondent to pay his costs.

Solicitor for applicant: *N. Herbert Smith.*
Solicitor for respondent: *H. C. Barker.*

F. E.

Considered. *Re* WESTBY'S SETTLEMENT [1950] 1 Ch. 296

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Feb. 11, 12, 13.

In re TANCRED'S SETTLEMENT. SOMERVILLE *v.* TANCRED.

[1902 T. 1187.]

In re SELBY. CHURCH *v.* TANCRED.

[1902 S. 2810.]

Power—Successive Appointments—Cumulative or Substitutionary—Election—Intention—Life Interest—Forfeiture Clause—Dispose or attempt to dispose of—Assignment to Trustees of Marriage Settlement.

Sir Thomas and Lady Tancred, acting under a power contained in a settlement to appoint in favour of children (other than an eldest son), appointed one-seventh of a sum of 7000*l.* to each of two of their daughters. At the dates of those appointments there were living seven children besides an eldest son. After the death of Sir T. T., and when there were living only six children (besides an eldest son), of which six the two said daughters were two, Lady T. by two deeds-poll appointed the whole fund equally to all her children other than the eldest son in sixths:—

Held, that no question of election arose; that the question depended upon the true construction of the deeds of appointment; and that the two daughters who had each received one-seventh could not also take one-sixth, inasmuch as it was the intention of Lady T., as shewn by the last appointments, that the whole fund should go in sixths.

England v. *Lavers*, (1866) L. R. 3 Eq. 63, explained and followed.

A person entitled to a life interest, determinable if he should dispose or attempt to dispose of it, assigned it to the trustees of his marriage settlement upon trusts under which he was to receive the income for life. By the settlement he appointed the trustees his attorneys to receive the income, and gave them power to pay the expenses of managing the trusts:—

Held, that this was not a disposition or attempted disposition of his life interest so as to cause it to be forfeited.

Observations upon *In re Porter*, [1892] 3 Ch. 481.

Two summonses which referred to the same parties, and approximately to the same facts, and were therefore heard together.

On April 15, 1839, a settlement was executed on the marriage of Sir Thomas Tancred, Bart., and Lady Tancred (then Miss Jane Selby), whereby a sum of 7000*l.* secured on mortgage was settled upon trust for Sir Thomas Tancred for life, and after

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his death for Lady Tancred for life, and then for their children other than an eldest son "at such age or ages, time or times, on such events, and, if more than one, in such shares and proportions and with such provisions for maintenance, education, and advancement, and subject to such conditions and substitutions in favour of any one or more of the others or other of them, and either by way of portion, annuity, or otherwise," as the said Thomas Tancred and Jane Selby, his intended wife, or the survivor of them, should appoint, with a gift over to their children in default of appointment.

There were ten children of the marriage. Three died before the execution on April 17, 1891, of the appointment under which the questions now in dispute arose. There were, therefore, at that date (excluding the eldest son) six children interested—namely, Prideaux Francis Tancred, Seymer Mitford Tancred, Harry George Tancred, Edith Jane, who married G. P. Williams in January, 1875, Bertha Evelyne, who married William Fownes Somerville in 1878, and Lucy Sybil, who married R. S. Hawkins in 1867.

On the marriage of Mr. and Mrs. Hawkins a settlement dated February 27, 1867, was executed, which contained a covenant to settle after-acquired property of the latter of the value of 300*l.* and upwards.

By the will of Prideaux John Selby, who died March 28, 1867, certain property was devised upon trust for Lady Tancred for life, and after her death as she should by deed or will appoint in favour of her children or grandchildren, with a gift over to her children in default of appointment.

On September 10, 1872, Sir Thomas Tancred and Jane, his wife, executed a deed-poll whereby, after reciting the power conferred on them by the deed of 1839 to appoint the 7000*l.*, the power of appointment given by the will of P. J. Selby, and that they had seven children living besides their eldest son, they appointed that one-seventh share of the said sum of 7000*l.* should, subject to their life interests therein, go, remain, and be to such uses as Mrs. Hawkins should by deed or will, notwithstanding coverture, appoint, and in default of any such appointment, and so far as no such appointment should extend

to Mrs. Hawkins, her executors, administrators, and assigns absolutely. This deed-poll also contained a similar appointment by Lady Tancred of property derived from her father, Prideaux John Selby.

The one-seventh thus appointed was caught by the after-acquired property clause in Mr. and Mrs. Hawkins' settlement, and thus became settled upon trust during their joint lives for Mrs. Hawkins for life for her separate use without power of anticipation, and then for Mr. Hawkins for life, and then for their children as Mr. and Mrs. Hawkins or the survivor of them should appoint, and in default of appointment for their children equally.

On October 14, 1878, Sir T. and Lady Tancred, in view of the intended marriage of their daughter Bertha Evelyne to W. F. Somerville, appointed another one-seventh part of the 7000*l.* in trust for her, to be an interest vested in her upon the solemnization of her marriage, subject to their own life interests.

Upon October 19, 1878, Mr. and Mrs. Somerville's marriage settlement was executed, whereby the one-seventh was assigned by Mrs. Somerville to trustees.

Sir Thomas Tancred died on September 7, 1880.

On April 17, 1891, before which date another of her children had died, Lady Tancred executed another appointment. She did not refer to the former appointments, but recited the power given by the deed of 1839, and that in the events which had happened she had a power of appointment subject to her life interest therein over "the said sum of 7000*l.*" among her six surviving younger children; she also recited the power given by Mr. Selby's will, and she appointed that the said sum of 7000*l.* and the Selby property should be vested in trustees upon trust to pay three-sixths of the income to her three daughters for their respective lives in equal shares for their separate use without power of anticipation, and then upon trust to hold one-sixth of the corpus as each daughter should appoint in favour of her children, and in default of appointment for her children equally, and upon trust to pay the income of the other three-sixths to her three sons in equal shares, such income to

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be respectively paid only until a son should "assign, charge, or otherwise dispose, or attempt to dispose, of the said share of income, or any part thereof, or become bankrupt, or do or suffer something whereby the said income, if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person," in which case the income was to be applied for the maintenance of the three sons, or any of them, as the trustees thought fit. Subject thereto, the three-sixths of the sons were to go to their children.

It was discovered that the appointment of April 17, 1891, was in excess of the power given by the deed of 1839 in respect of the 7000*l.*, although it was good so far as it related to the Selby property; and on February 3, 1893, Lady Tancred executed a deed-poll whereby, after reciting that it was supplemental to the deed of 1839 and to the deed of 1891, by which she had "affected" to appoint the 7000*l.*, she appointed that after the death of each of her three daughters one-sixth of the 7000*l.* should be held in trust for such daughter, her executors, administrators, and assigns, absolutely, and that after the death of each of her three sons one-sixth of the 7000*l.* should be held in trust for such son, his executors, administrators, and assigns, absolutely; and concluded as follows: "My intention being that by virtue of the" appointment of 1891 "and these presents each of my said six children shall take a vested interest in one-sixth of the capital and income of the said sum of 7000*l.* and the investments thereof, subject only to my own life interest therein under the settlement."

By a deed-poll, also of February 3, 1893, Lady Tancred made a further appointment of the Selby property, to take effect in the event of any of her daughters dying without issue; but this appointment is immaterial for the purpose of the present report.

Many questions were raised by the two summonses, and his Lordship held, inter alia, that the restrictions imposed by the appointment of 1891 on the life interests of the children in the 7000*l.* were invalid, but good in respect of the Selby property. Two questions—namely, whether Mrs. Hawkins and Mrs. Somerville were bound to elect between the one-seventh shares

given by the appointments of 1872 and 1878 and the one-sixth shares given by the appointments of 1891 and 1893, or could take both; and, secondly, whether the restricted life interest in the Selby property, given to Seymer Mitford Tancred by the appointment of 1891, had been forfeited by his assignment of that interest to the trustees of his marriage settlement—were then argued separately.

Astbury, K.C., and *John Henderson*, for the trustees of the settlement of 1839.

Buckmaster, K.C., and *H. B. Howard*, for Prideaux Francis Tancred and Harry George Tancred and Mr. and Mrs. Williams. Mrs. Hawkins and Mrs. Somerville must bring into hotchpot the one-seventh shares appointed to them in 1872 and 1878 before they can take the one-sixth shares appointed by the deeds of 1891 and 1893. They cannot have both; they must elect under which they will take, and must give compensation: *England* v. *Lavers* (1); *In re Keon's Estate.* (2) Those cases are not overruled by *In re Ashton* (3), which turned on the fact that a will speaks from the death of the testator. That decision shews that the doctrine of double portions has no application here. The Court will give effect to the intention of the donee of the power; and it is quite clear that by the deeds of 1891 and 1893 Lady Tancred meant to deal with the whole 7000*l.* Therefore each child is entitled to one-sixth of 7000*l.*

Ingpen, K.C., and *L. W. Byrne*, for the trustees of the Hawkins settlement. There cannot be any election. The persons who would have to elect would be Mrs. Hawkins and people claiming under her, and, inasmuch as she is restrained from anticipation, she cannot elect: *In re Wheatley* (4); *In re Vardon's Trusts* (5); *Haynes* v. *Foster.* (6) If the doctrine of election applies, all the persons interested will elect to take under the instruments and not against them; so no compensation will be required: *In re Lord Chesham.* (7) The result is

(1) L. R. 3 Eq. 63.
(2) (1879) 3 L. R. Ir. 228.
(3) [1897] 2 Ch. 574.
(4) (1884) 27 Ch. D. 606.
(5) (1885) 31 Ch. D. 275.
(6) [1901] 1 Ch. 361.
(7) (1886) 31 Ch. D. 466.

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that we keep the one-seventh, and also take one-sixth of five-sevenths.

Ashton Cross, for the Somerville trustees and Mr. Somerville.

Birrell, K.C., and *G. E. S. Fryer*, for Mrs. Somerville. The decision in *England* v. *Lavers* (1) can only be supported as a case of election. The former appointments were irrevocable, and the donee of the power could not substitute other interests for them. The decision is contrary to *Trollope* v. *Routledge* (2) and other cases which were cited, and it ought not to be followed. Even if Lady Tancred did intend by the deeds of 1891 and 1893 to equalize the shares of her children, the Court can only give effect to that desire by means of the doctrine of election. Mrs. Somerville cannot elect, because the one-seventh appointed in 1878 is vested in her trustees, and the one-sixth is given to her, not to them.

H. Terrell, K.C., and *Cann*, for a son of Mrs. Hawkins. Lady Tancred could not have intended to alter the interests appointed in 1872 and 1878, for she had forgotten all about them.

Darley, for Seymer Mitford Tancred and the trustees of his marriage settlement.

BUCKLEY J. stated the facts, and continued:—The question has been argued whether these instruments raise a case of election. It is said that, in the case, for example, of Mrs. Hawkins, who had, under the deed-poll of 1872, become entitled to one-seventh of the 7000*l.*, and, under the deeds of 1891 and 1893, had become entitled to another share of the 7000*l.*, she can take both, and that, inasmuch as she is restrained from anticipation, she cannot elect. In support of this proposition *In re Wheatley* (3), *In re Vardon's Trusts* (4), *In re Lord Chesham* (5), and *Haynes* v. *Foster* (6) were cited. On the other hand, it was contended that this is not a possible state of things; that she must elect under which instrument she will take; that she cannot take both interests without

(1) L. R. 3 Eq. 63.
(2) (1847) 1 De G. & Sm. 662.
(3) 27 Ch. D. 606.
(4) 31 Ch. D. 275.
(5) 31 Ch. D. 466.
(6) [1901] 1 Ch. 361.

making compensation to her brothers and sisters, and *England* v. *Lavers* (1) was relied on. To my mind the case is not one of election at all. The determination of the question depends on what was the effect of the deeds of 1891 and 1893, having regard to what had been done in 1872 and 1878. Where power is given to a person to dispose of property, it must in the first place be shewn that all the requisite formalities have been observed, and, if they have been, the Court must then look for the intention of the person who disposes of the property. Therefore I have to read these four deeds of appointment and say what it was that the donee of the power intended to do. At the outset this is obvious—that, after the deed of 1872, Mrs. Hawkins could not take less than one-seventh of the 7000*l.* Lady Tancred had no power to undo what had been effected by that appointment, but she could, of course, give a larger interest than she had previously given, and in that sense could make a substitution. By substitution I do not mean that, after 1872, she or anybody else could undo what had been then done; nor did Lord Romilly mean that in *England* v. *Lavers*. (2) But she could in place of the smaller sum of 1000*l.* give the larger sum—namely, one-sixth of 7000*l.* It is impossible to read the deeds of 1891 and 1893 without seeing that Lady Tancred thought she still had 7000*l.* to dispose of, and that she meant to give it to her children in equal shares. By the deed of 1891 she had affected to appoint it in that way. In 1893 she disposed of it finally, and the closing words of that deed seem to me to settle the question. She concludes by saying: "My intention being that by virtue of the principal appointment and these presents each of my said six children shall take a vested interest in one-sixth of the capital and income of the said sum of 7000*l.* and the investments thereof subject to my own life interest therein." That is what she meant to do, and even without the deed of 1893 I should construe the deed of 1891 in the same way. It is perfectly easy to give effect to her wishes. There remained after the deeds of 1872 and 1878 enough of the 7000*l.* to give to the children who had not had a share one-sixth, and to give to those who

(1) L. R. 3 Eq. 63. (2) L. R. 3 Eq. 69.

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had already had one-seventh a further sum sufficient to bring their share up to one-sixth. This is, I think, the joint effect of the several deeds.

In *England* v. *Lavers* (1), the case before Lord Romilly, the facts were singularly like those in the present case. The Master of the Rolls said: "My opinion is, that the deed-poll is in substitution for the former appointments. Of course the donee of the power could not interfere with these; but I think that when he executed the deed-poll, he meant to give to each of his daughters one-sixth of the fund, not in addition to the one-seventh he had already given them, but in substitution for it." Lord Romilly is obviously pointing out that by substitution he did not mean that the donee of the power could undo the former appointments and put the deed-poll in their place, but that it was substituted for them in the sense that by dividing the fund into fewer shares the appointor increased the value of the shares given by the previous appointments and to that extent altered them. It would have been more accurate to say, "In addition to the former appointments, so as to equalize the shares taken by the children in the same manner as if the deed-poll had substituted a larger gift for the smaller one made by the former appointments." It is said that the decision of Stirling J. in *In re Ashton* (2) must be taken as derogating from the authority of Lord Romilly's decision. I do not think so. In *In re Ashton* (2) the donee of a power to appoint 10,000*l.* made her will, and thereby appointed the 10,000*l.* equally between her three children. After the will had been signed she executed a deed appointing one-third of the fund to one of the children. Subsequently she died without having altered her will, and Stirling J. held that the child to whom the appointment was made by deed was entitled to take under the will a third of the residue of the fund. That is not this case. The will written before the deed described the sum as 10,000*l.*, which it was. Subsequently when the deed was executed one-third of the fund was taken away. The will must be read as at the death of the testatrix, and if it had been executed then the amount of the fund would as matter of figures have

(1) L. R. 3 Eq. 63, 69. (2) [1897] 2 Ch. 574.

had to be altered. That is all. *In re Ashton* (1) has no bearing on this case. I decide this point upon the ground that upon the true construction of these deeds Lady Tancred intended each child to take one-sixth of the whole fund. *England* v. *Lavers* (2), when properly understood, governs this case, and the whole of the fund passes in sixths.

The question was then argued whether Seymer Mitford Tancred had, by settling it on his marriage, forfeited the life interest in the Selby property to which he was entitled under the deed of 1891.

By his marriage settlement, dated September 24, 1896, and made in Scottish form, Seymer Mitford Tancred, in order to make a provision for his intended wife and his children (if any), transferred to trustees all his interest under the will of P. J. Selby, and he appointed the trustees his attorneys to demand and recover that interest. All sums received by the trustees by virtue of the assignment were to be held by them upon trusts under which S. M. Tancred was to be entitled to the income thereof during the marriage; and it was further declared that the settlement was made for the purpose of paying all necessary charges and expenses of the execution and management of the trust, and the trustees had power to receive and to sell all the settled property.

Darley, for Seymer Mitford Tancred and the trustees of his settlement, was stopped by the Court.

Cann, for grandchildren of Lady Tancred. By the assignment to the trustees of his settlement Seymer Mitford Tancred has forfeited his life interest. The words of the deed are that he "assigns, transfers, conveys, and makes over" all his interest under the deed of 1839, so that he has clearly "disposed of it." The trustees of the deed of 1839 could no longer pay the income to him. Execution of a deed of assignment even if it can have no operation at all is a cause of forfeiture: *In re Porter*. (3) This is a legal assignment, and he has not

(1) [1897] 2 Ch. 574. (2) L. R. 3 Eq. 63.
(3) [1892] 3 Ch. 481.

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retained the whole of the beneficial interest, for he appointed the trustees his attorneys to receive the income, and he gave them power to charge his income with the expenses of the trust.

BUCKLEY J. referred to the settlement of 1896, and proceeded:—The whole of Seymer Mitford Tancred's life interest which has been assigned to the trustees of the settlement is by the terms of the trusts payable to him alone. He has disposed of it to trustees, and he is the only cestui que trust. It did not become "payable to or vested in some other person" except upon trust to pay it to him. So far, I do not think there is any forfeiture.

It is said that under the clause which authorizes payment of the charges and expenses of the trust the trustees would have a right to look to this fund for recoupment of their expenses, and that that is a disposition or attempted disposition of the income whereby it would become "payable to or vested in some other person." In my opinion it is not. The clause is intended to provide that, if a tenant for life disposes or attempts to dispose of his interest so as to lose the enjoyment of it himself, or if he should become bankrupt, his life estate should cease and be given over to others. This has not happened. Seymer Mitford Tancred remained after the settlement the only person entitled to the income. The mere fact that the trustees may be entitled to have their expenses recouped to them out of the income does not make it a disposition within the clause. It is parallel to the case of a person who is going abroad and appoints somebody to collect his rents on the terms that he should be paid by deducting a commission. Neither is the appointment of the trustees to be his attorneys to recover the income an assignment. He only appointed them to act as his agents, retaining the beneficial interest himself.

I should have thought that the words "dispose or attempt to dispose" in this connection were used with the following intent: A person cannot "dispose of" an interest which comes to an end ipso facto by the act of attempted disposition.

The more accurate expression in such circumstances is "attempt to dispose of." The draftsman, therefore, says "dispose or attempt to dispose." It is said, however, that North J. in *In re Porter* (1) held that the words "attempt to dispose" relate to a disposition which fails by reason of its having no legal effect apart from the operation of this clause. Even if that were so it would not cover this case, for this was neither a disposition nor an attempted disposition. There was, therefore, no forfeiture.

Solicitors: *Payne, Shaw-Mackenzie & Lake; Flower & Flower; Gray, Mounsey & Fuller.*

H. C. R.

In re BRITISH ELECTRIC STREET TRAMWAYS.

[0052 of 1903.]

Company—Winding-up—Withdrawal of Petition—Costs of Persons appearing to support or oppose—Companies Winding-up Rules, April, 1892, r. 20.

When the petitioner for a winding-up order elects at the hearing to withdraw his petition, he will be ordered to pay the costs of those persons who have given notice, within the time limited by the Companies Winding-up Rules, April, 1892, r. 20, of their intention to appear—one set of costs to those supporting, and another set to those opposing.

A PETITION was presented for the winding-up by the Court of the British Electric Street Tramways, Limited. Certain creditors and shareholders appeared by counsel on the day on which the petition was in the paper for hearing, some of whom had, and others had not, served on the petitioner notices under the Companies Winding-up Rules, April, 1892, r. 20, of their intention to appear at the hearing of the petition, and to support or oppose it. On the petition being called on,

Sheldon, for the petitioner, declined to open the petition, and asked leave to withdraw it.

Le Breton, for persons supporting the petition. My clients

(1) [1892] 3 Ch. 481.

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gave notice of their intention to appear and support the petition, and are entitled to their costs as against the petitioner.

Sheldon. The petitioner is not liable to pay these costs. Subject to the power of the Court to substitute another person as petitioner when a petition is withdrawn, the petitioner is entitled to dismiss it, or to agree with the company for its withdrawal upon terms: Buckley on Companies, 8th ed. p. 267. It is also there stated that "the advertisement of the petition is an invitation to the creditors and contributories to appear if they think proper: and if the petitioner elects to dismiss his petition he must provide for their costs." But there is a distinction between dismissing a petition and withdrawing it, and in the latter case persons appearing are not entitled to their costs.

[BUCKLEY J. referred to *In re Patent Cocoa Fibre Co.* (1)]

George Henderson and *L. Ryland*, for creditors and shareholders supporting and opposing the petition.

Martelli and *S. C. N. Goodman*, for the company.

BUCKLEY J. In this case a petition was presented asking for a compulsory order to wind up the company. On the petition being called on, counsel for the petitioner elected to withdraw the petition, and urged that he was entitled to do so without providing for the costs of those who after due notice have appeared to support or oppose the petition. Some time has been taken up in endeavouring to differentiate between the dismissal of a petition and the withdrawal of it. No distinction exists in favour of the petitioner as to the liability to pay costs.

It has long been settled that a petitioner who withdraws his petition precludes the Court from forming a judgment as to the merits of the case, so that the Court is unable to say which of the parties would have succeeded if the petition had been proceeded with. A petitioner by presenting and advertising his petition invites others to attend, and exposes himself to the risk of having to pay costs to persons who on giving proper notice are entitled to be heard, and who appear in support of or

(1) (1876) 1 Ch. D. 617, 618.

in opposition to it. If the petition is withdrawn, the Court cannot say whether any and which of these parties would have got their costs if the petition had been heard.

In *In re Patent Cocoa Fibre Co.* (1) Jessel M.R. said: "A creditor presents a petition for winding up a company, and when the petition is called on he elects to withdraw it. In other words, he declines to open it, and submits to have it dismissed. The result is, that the Court cannot even look at the petition, and can know nothing about it beyond the mere fact that a petition has been presented, which, for some reason or other, the petitioner does not choose to open. Thereupon counsel say they appear for persons alleging themselves to be creditors of the company, who are attracted hither by the advertisement of the petition, and intended to oppose it if opened, and they ask for their costs of appearance. I think they are entitled to their costs."

That rule was laid down long ago, and it is obviously a rule of fairness. Persons who come into Court to appear on the hearing of a petition ought not to suffer by the withdrawal of the petition. If a petition is presented and advertised, the petitioner in a manner makes those persons parties to his proceedings, and if he afterwards elects to withdraw his petition he must pay their costs.

The rule laid down by Sir George Jessel is modified to this extent, that under the practice which I have adopted persons are not entitled to costs unless they have given notice, within the time limited by rule 20 of the Companies Winding-up Rules, April, 1892, of their intention to appear on the hearing of the petition.

In the present case I order the petitioner to pay the costs of the persons who have given proper notices—one set of costs to those appearing to support, and one set of costs to those appearing to oppose.

Solicitors for petitioner: *Maddocks & Colson.*

Solicitors for other parties: *Joseph Davis; Wainwright, Pollock & Co.; Ward, Bowie & Co.; Lumley & Lumley.*

(1) 1 Ch. D. 617, 618.

F. E.

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March 4, 5, 10.

In re LONDON AND GLOBE FINANCE CORPORATION, LIMITED.

[00418 and 00419 of 1901.]

Company — Winding-up — Director — Prosecution — Payment of Costs out of Assets—Refusal of Public Prosecutor to prosecute—Discretion—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 167.

In order to determine whether leave ought to be given to institute criminal proceedings against the director of a company which is being wound up, and whether the costs of the prosecution ought to be paid out of the assets of the company, the Court will look at the question from the point of view of an individual, and will consider whether it would be the duty of a good citizen even at a loss to himself to institute and carry on proceedings to punish the criminal. It is not necessary to find that the facts are so plain that a conviction must ensue. The proportion of creditors who support and oppose the application, and the effect which will be produced upon the estate by payment of costs, will be taken into consideration, but not the personal advantage of the individual, nor motives of vengeance against the offender, nor pecuniary benefits to be obtained for the creditors or shareholders. The fact that the law officers of the Crown have refused to allow the public prosecutor to undertake the prosecution is not necessarily irrelevant.

THE London and Globe Finance Corporation, Limited, was registered on March 1, 1897, with a nominal capital of 2,000,000*l.* in shares of 1*l.* each, its object being to acquire the undertakings of the West Australian Exploring and Finance Corporation, Limited, and of the old London and Globe Finance Corporation, Limited, and to carry on financial operations of all kinds.

Mr. Whitaker Wright was managing director of the London and Globe Finance Corporation.

On January 14, 1901, resolutions were passed for the voluntary winding-up of the corporation. On the 19th of the same month the Court made an order continuing the voluntary winding-up under the supervision of the Court. On October 30, 1901, upon the petition of a creditor, the Court made an order for the compulsory winding-up of the corporation, and the official receiver became the provisional liquidator. On Decem-

ber 16, 1901, the statutory meetings of creditors and shareholders were held, when it was resolved that the official receiver should remain liquidator of the corporation with a committee of inspection consisting of eight persons, five of whom (including the official assignee of the Stock Exchange) were nominated by creditors and three by shareholders.

Mr. Whitaker Wright and other directors and officials of the company were publicly examined, and a state of affairs was disclosed which gave rise to a suggestion that proceedings ought to be taken against Mr. Whitaker Wright on account of his alleged conduct as managing director. The official receiver, at the instance of the committee of inspection, requested the public prosecutor to take the requisite steps; but he, acting upon the advice of the law officers of the Crown, refused to institute a prosecution.

Funds were subscribed to enable a prosecution to be undertaken; an offer was made to pay at least 1250*l.* into court; and it was desired that such further sums as might be necessary for that purpose should be paid by the official receiver out of the assets of the company. A dividend of 1*s.* in the pound had been paid, and it was hoped that another of the same amount might be distributed.

On January 20, 1903, Mr. John Flower, a creditor of the company and member of the committee of inspection, took out a summons for an order that the official receiver might be directed to institute and conduct a prosecution of Mr. Whitaker Wright for certain offences alleged to have been committed by him in relation to the company and the members and creditors thereof, and that all costs and expenses incurred in such proceedings should be paid out of the assets of the company. The summons was supported by creditors to the amount of about 650,000*l.*; creditors for about 100,000*l.* were neutral.

The Nickel Corporation, who opposed the application so far as it related to payment out of the assets, were creditors for about 175,000*l.*

Counsel for the summons asked that the application should be heard in camerâ, but Buckley J. declined to accede to this suggestion.

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Avory, K.C., and *Clavell Salter*, for the summons. We ask the Court, under s. 167 of the Companies Act, 1862, to direct the official receiver to take proceedings against Mr. Whitaker Wright for such offences, under ss. 83 and 84 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), and s. 166 of the Companies Act, 1862, as he may be advised. On the facts a strong primâ facie case is shewn against Mr. Whitaker Wright; and the question remains whether the prosecution, if directed, should be paid for out of the assets of the corporation. The shareholders can never receive anything, so they have no interest in the question. The interest of the creditors is very slight. It is not expected that they will get more than another 1*s.* in the pound, and the costs of the prosecution, estimated at 3500*l.* besides the subscribed fund, will only reduce that dividend by about a halfpenny in the pound. Under s. 167 the Court will direct payment to be made out of the assets, even on its own motion, unless the great majority of the creditors object to it. Here the opposition comes only from a small number of creditors, and the application is supported by a great majority, and also by people who have no private feelings on the subject, such as the official assignee of the Stock Exchange.

Astbury, K.C., and *T. L. Wilkinson*, for the Nickel Corporation. We do not object to the prosecution, but we say that the costs ought not to come out of the assets. There has never been a case in which leave to prosecute has been given after it has been refused by the law officers of the Crown.

[BUCKLEY J. I do not know what materials were before them, and I must decide the question of law for myself. Ought not the Court to consider it from the point of view of an individual who has to determine whether as a good citizen it is his duty to prosecute even at his own loss?]

That may be so; but it cannot be the duty of an individual to prosecute another man's servant; and Mr. Whitaker Wright was not in our service. He has not defrauded us in that capacity. Our only interest is to save something out of the wreck, and most of our shareholders are Americans and have no wish to punish anybody. It cannot be the duty of an individual to take proceedings in order to obtain some benefit

for himself, or to take vengeance on Mr. Whitaker Wright. Leave will not be given against the wishes of a substantial minority: *In re Eupion Fuel and Gas Co.* (1) The Court is not obliged to give leave; the word "may" in s. 167 does not mean "must": *In re Northern Counties Bank, Limited.* (2) An order was made in *In re Charles Denham & Co., Ld.* (3); but that was chiefly on the ground that justice might have been defeated, if instead of at once commencing proceedings the public prosecutor were communicated with. Here that has already been done, and in vain. There is no case which lays down any general principle on which the discretion of the Court under this section should be exercised.

Rufus Isaacs, K.C., and *G. F. Hart*, for the official receiver, did not support either party.

Avory, K.C., in reply.

Cur. adv. vult.

March 10. BUCKLEY J. The questions which arise upon this application are of the largest general importance. Their importance lies, not only nor even principally in the fact that the application is made in the winding-up of a corporation whose affairs have become matter of great public notoriety, and in which grave and grievous frauds are said to have been committed, but rather because for the proper decision of the matter it is necessary to investigate the general principles upon which a criminal prosecution at the expense of the estate ought to be directed under s. 167 of the Companies Act, 1862. The statutes relating to limited liability have probably done more than any legislation of the last fifty years to further the commercial prosperity of the country. They have, to the advantage as well of the investor as of the public, allowed and encouraged the aggregation of small or comparatively small sums into large capitals which have been employed in undertakings of great public utility, largely increasing the wealth of the country. But at the same time in this branch of the law the apathy of the public in setting the law in motion has, I

(1) W. N. (1875) 10. (2) (1883) 31 W. R. 546.
(3) (1884) 32 W. R. 920.

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will not say encouraged, but has at least failed to repress, grievous frauds which have been committed and too often have gone unpunished. Relatively, I think, compared with the advantages which have accrued from the law of limited liability, the mischief of such frauds has been small, but when regarded, not relatively, but absolutely, the frauds which have been committed under cover of these Acts have no doubt been great. Recourse has seldom been had to s. 167 of the Act of 1862, or to other remedies which the law provides. The Act of 1890, by ss. 7 and 8, gives machinery by which light must in every case of compulsory liquidation be let in upon the dealings of the company, resulting, in case the official receiver finds that fraud has been committed, in the public examination of promoters or directors. In the case before me that machinery has been employed, fraud has been found, a public examination has taken place. The question I have to determine is whether in the result the power given by s. 167 of the Act of 1862 ought to be exercised, and a direction given to the official receiver to institute a criminal prosecution at the expense of the estate.

The applicant, Mr. John Flower, is a creditor of the London and Globe Finance Corporation and a member of the committee of inspection. He asks for an order directing the official receiver to prosecute at the expense of the estate Whitaker Wright, who was the managing director of the corporation. The prosecution which it is sought to institute would be under ss. 83 and 84 of the Larceny Act, 1861, and s. 166 of the Companies Act, 1862, or one of those sections. The transactions impeached took place before the Companies Act, 1900, came into operation. Sect. 28 of that Act is therefore not applicable.

In both ss. 83 and 84 of the Larceny Act of 1861, and s. 166 of the Companies Act, 1862, the offence is that of making or publishing a false statement or account, or a false or fraudulent entry with intent to deceive or defraud. To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by

deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action. The first question I have to determine is whether there is here shewn a case of doing some or one of the acts mentioned in the sections to which I have referred with intent to deceive or defraud. It is not in my opinion necessary that I should find that the facts are so plain as that a conviction must ensue. Until the accused has been heard in his defence, no man can or ought to say that he must be or ought to be convicted. I must look to see whether such facts are made out as that, if they are not shewn to be erroneous or displaced by other facts, a conviction ought to ensue. I must look to see whether there is a primâ facie case. For obvious reasons I do not here analyze and examine the facts upon which I arrive at the conclusion that such a case has been shewn. Upon a full consideration of the facts brought before me, I am of opinion that a case has been shewn.

I have next to consider upon what principles I ought to exercise the power given me by s. 167 of the Companies Act, 1862, to direct the official receiver to institute and conduct a prosecution at the expense of the assets. It is obvious that no one legitimately can or ought to institute a criminal prosecution with a view to his personal profit. Neither should a prosecution be instituted from motives of vengeance against the offender. The motive of every prosecution ought to be to inflict punishment upon the criminal for the proper enforcement of the law and for the advantage of the State, and with a view to deter others from doing the like. From the prosecution no doubt there may arise benefit to the prosecutor in the sense that, if he be a person interested in commerce, it may be to his advantage to enforce commercial morality. But except in this sense the personal advantage of the prosecutor is not to be regarded. The principle upon which I am to apply s. 167, therefore, cannot be that I ought to regard the pecuniary benefit or advantage of the class at whose expense the prosecution would be conducted.

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Again, the general scheme of the Acts with reference to the liquidation of a company no doubt is that the assets are to be realized to the best advantage for the benefit of those who are entitled to share in their distribution. But indications are not wanting that the assets may under the Acts be applied for some purposes other than these. Sect. 167 of the Act of 1862 is, having regard to the reasons which I have just given, one example of this, and in the Companies (Winding-up) Act, 1890, the same intent may be traced in ss. 7 and 8 of that Act. These are sections which require the preparation of a statement of the company's affairs at the expense of the assets leading to a preliminary report, which is to shew whether further inquiry is desirable as to matters relating to the promotion and the like, and, if necessary, to a public examination of parties incriminated, with the purpose, of course, of enforcing commercial morality. It is, therefore, in my judgment plain that the principle upon which I am to apply, or refuse to apply, s. 167 is not measured or limited or even concerned with pecuniary benefit to be obtained for the shareholders or creditors.

So far I have addressed myself negatively to the considerations which, in my judgment, cannot govern the matter. Next, affirmatively, what are the considerations which ought to govern it? The principle lies, I think, in the answer to the following question. If the persons at whose expense the prosecution would be instituted were not a class, but were a single person, and that person were an honest and upright man desirous as a good citizen of doing his duty by the State, are the circumstances such as that in discharge of that duty he would feel that he ought at his own expense and to his own loss to institute a prosecution? Not in every case in which a criminal offence has been committed would such an one think it his duty to prosecute. The question to be answered is, Would he in this case think his duty to the State required him to prosecute? If that question be answered in the affirmative, then, upon principle, I think that the Court ought to direct a prosecution. Further, I think that the Court

can, and in a proper case ought to, direct a prosecution without the assent, and even notwithstanding the dissent, of the class or many of the class at whose expense the prosecution would be instituted. It is noticeable that the section provides that the Court may act "of its own motion." No principle suggests itself to me upon which the Court ought "of its own motion" to direct a prosecution other than that above indicated. The first question, therefore, which I ask myself is, Would a good citizen, in the discharge of his duty to the State, think that in this case he ought to prosecute and bear the expense? I answer the question in the affirmative.

The above is, in my judgment, the dominant and guiding principle. But there are other considerations to which due weight, no doubt, ought to be given. One of them deserving of consideration, although in my judgment much less than that which precedes, is the question of the proportion of the class affected who respectively approve and disapprove the institution of a prosecution.

Upon this head the facts in the present case stand thus. There is a committee of inspection under the Act of Parliament consisting of eight persons, who ought to have, and I have no doubt have, an intimate knowledge of the affairs of this company. At a meeting of the committee held on February 13 last four members (of whom the applicant is one) were present. They were unanimous in desiring a prosecution at the expense of the assets. A fifth member states that had he been present he would have voted with them. A sixth writes that it is difficult for him to say how he would have voted after a discussion at which he was not present, but that if counsel had advised that a prosecution if instituted would succeed, he would have considered it his duty to vote for the resolution. A seventh is travelling in South America and is not accessible. The eighth, Mr. Brigstock, states that he would have voted against it. Mr. Brigstock is a member of the firm of Read & Brigstock, who were the private stockbrokers of Whitaker Wright, the accused, and are stated to be at the present time acting as his brokers. So much for

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the committee of inspection. As regards the creditors themselves, creditors to the amount of about 650,000*l.* desire a prosecution, while others to the amount of about 100,000*l.* have expressed themselves as neutral. The Nickel Corporation, creditors for about 175,000*l.*, oppose actively. The total amount of the admitted claims is about 1,665,000*l.* A substantial majority of the creditors who have expressed any view, therefore, are in favour of a prosecution; but those who oppose are, no doubt, creditors to a large amount. I say nothing about any questions personal to the latter in the matter of their opposition. I do not find anything in the above facts which would induce me to abstain from making an order.

A second subsidiary question deserving of consideration is whether the expense of a prosecution would bear hardly upon the creditors. The expense is put roughly at 5000*l.* The applicant is prepared to pay not less than 1250*l.* into court towards the amount required. The admitted claims of 1,665,000*l.* have received a dividend of 1*s.* in the pound, requiring, say, 83,250*l.* There are further possible claims of substantial amount. Allowing for the fact that possibly some of these may be admitted hereafter, the remaining assets, which are, approximately, 100,000*l.*, may probably pay another 1*s.* in the pound. If 3750*l.* were wanted for the prosecution, the dividend may be diminished by about a halfpenny in the pound.

In this state of things it is, I think, impossible to say that, as against the considerations to which I have already pointed, an order ought to be refused because it would bear hardly upon the creditors.

There remains the fact to which I undoubtedly ought to give, and desire to give, all due weight, namely, that the Attorney-General has in this case declined to set the public prosecutor in motion. The first observation I have to make upon this is that the question which the Attorney-General had to consider is, to my mind, a different question to that which I have to consider. The conclusion at which he arrived may, for aught I know, be no guide at all for the purpose of

determining the question before me. In arriving at his decision the Attorney-General may have gone upon any one of the following grounds, either (1.) that the Prosecution of Offences Act, 1879, does not apply to every case in which a criminal prosecution will lie. The Attorney-General may have thought that, having regard to s. 2 of that Act, this case did not fall within it; or (2.) he may have thought that the public prosecutor ought not to be set in motion unless there was more than a probability, unless there was a reasonable certainty, that a conviction would ensue, and that he did not think there was such a certainty; or (3.) he may have thought that, inasmuch as s. 7 of that Act leaves it open to any person to prosecute, there was, under this very s. 167 of the Act of 1862, a remedy available, and that there were funds, and that under those circumstances the matter ought to be left to the very remedy which I am now asked to apply, and that a prosecution ought not to be instituted at the public expense.

If his decision rested on any of the above grounds, it is irrelevant to anything which I have to decide, except that if it was on the third ground it would be not adverse to, but in favour of, my making this order.

If, however, his decision rested on the ground that in his judgment a primâ facie case for a prosecution was not shewn, no doubt that is a matter which would weigh with me very much. But, even if this last were the reason, still I do not know whether the materials before him extended to all those which are before me. The result therefore is that (1.) I do not know whether the conclusion at which the Attorney-General arrived was based upon considerations relevant to anything which I have to determine; and (2.) that even if it was arrived at upon a ground which renders it relevant, I do not know whether he was acting on the same materials. Under these circumstances it seems to me that I ought not to allow my judgment to be influenced even by the fact that the highest authority at the bar, and the first law officer of the Crown, has thought proper to decline to put the public prosecutor in motion. I must accept the responsibility of determining the question before me for myself.

BUCKLEY J.

1903

LONDON AND GLOBE FINANCE CORPORATION, LIMITED, *In re.*

The conclusion at which I arrive is that, upon the facts as they at present appear, a grave case of criminal offence committed is shewn, and that, upon the principles which I have endeavoured to explain, I ought to use my power under s. 167 of the Act of 1862. I direct the official receiver to institute and conduct against Whitaker Wright a criminal prosecution for such offences under ss. 83 and 84 of the Larceny Act, 1861, and s. 166 of the Companies Act, 1862, or any of those sections as he may be advised, and I order the costs and expenses of the prosecution to be paid out of the assets of the company, as far as funds be required, in aid of the 1250*l.* or other larger sum which the applicant will pay into court. The 1250*l.* or other larger sum should be paid into court before the order is drawn up, and its payment stated in the order.

Solicitors: *Simmons & Simmons; A. J. Greenop & Co.; Michael Abrahams, Sons & Co.*

H. C. R.

In re GRIFFITHS' POLICY.

JOYCE J.

1903

Feb. 26.

[1902 G. 2038.]

Husband and Wife—Policy of Assurance—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Policy "for Benefit of his Wife, or if she be dead between his Children"—Death of Wife and subsequent Marriage of Assured—Children born before and after issue of Policy—Child of second Marriage.*

A man who had a wife and four children effected a policy of assurance on his life under the Married Women's Property Act, 1870. The policy was expressed to be "for the benefit of his wife, or if she be dead between his children in equal proportions." The wife died, having had four more children after the issue of the policy. The assured subsequently married again, and had one child by his second wife. On his death, leaving his widow and nine children him surviving:—

Held, that the widow was not entitled to participate in the policy moneys, but that they went to the children of the first and second marriages in equal shares.

In re Lyne's Trust, (1869) L. R. 8 Eq. 65, not followed.

ADJOURNED SUMMONS.

On August 9, 1877, George Griffiths, since deceased, took out a policy of assurance under the Married Women's Property Act, 1870, in the Whittington Life Assurance Company, on his own life.

The policy provided that the funds and other property of the said company should be subject and liable to pay to the executors, administrators or assigns of the said assured within three calendar months next after satisfactory proof of the death of the assured the sum of 400*l.*, "for the benefit of his wife, or if she be dead between his children in equal proportions."

At the date of the policy George Griffiths had a wife, Jemima Annie Griffiths, then living. At that date there had been issue of the marriage four children only. Subsequently to that date there was issue of the said marriage four other children.

Jemima Annie Griffiths died on June 4, 1891.

On October 15, 1895, George Griffiths married Clara Margaret

JOYCE J. 1903 GRIFFITHS' POLICY, *In re.*

Farrell. There was issue of the last-mentioned marriage one child only, who was born on December 8, 1898.

George Griffiths died on August 27, 1902, leaving him surviving his second wife, the said Clara Margaret Griffiths, all his eight children by his first wife, and his one child by his second wife.

This was an originating summons, taken out in the matter of the trusts of the policy and of the Married Women's Property Act, 1870, asking for a declaration as to the persons interested in the policy moneys and of their respective interests therein.

By the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 10, it is provided that "A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate."

Cann, for the widow. The second wife is entitled to the policy moneys, to the exclusion of all the children: *In re Lyne's Trust* (1); *In re Browne's Policy*. (2) At any rate she is entitled to take equally with the children.

Stokes, for the children of the first marriage. The children by the second wife are not entitled to share. There is a marked distinction between s. 10 of the Act of 1870 and s. 11 of the Act of 1882, under which *In re Browne's Policy* (2) was decided. The second wife cannot take anything. The policy is "for the benefit of his wife, or if she be dead between his children." That means the person who was the wife of the assured at that time, and the children of that marriage.

[JOYCE J. Why should it be limited to the children by that wife?]

(1) (1869) L. R. 8 Eq. 65. (2) Ante, p. 188.

In *In re Lyne's Trust* (1) the gift was to a class. That case was observed upon by Stirling J. in *In re Drew* (2), where he pointed out that *In re Burrow's Trusts* (3) was not called to the attention of Malins V.-C., who decided *In re Lyne's Trust.* (1) In *In re Burrow's Trusts* (3), where there was a gift to the testator's brother, and after his death to his children, followed by a direction that if the brother's wife should survive her husband she should receive the rents and profits for her life, it was held that the wife there meant was not the brother's second wife.

Newton, for the child of the second marriage. "Wife" means the wife at the date of the policy. There is a difference between "wife and children" and "wife or children." The words "if she be then dead" point to the individual wife. The child of the second marriage is entitled to take with those of the first: *Barrington* v. *Tristram* (4); *Isaac* v. *Hughes* (5); *In re Seyton* (6); *In re Hancock.* (7)

Cann, in reply. The object of the Act was to enable an inalienable provision to be made for the settlor's wife and children, coming into operation at his death. A second wife is just as much the wife of the settlor as a first wife is. Having regard to the object of the Act, and to the time at which the persons entitled have to be ascertained, the second wife is clearly entitled. The observations of Stirling J. upon *In re Lyne's Trust* (1) were not necessary for the determination of the case before him, and *In re Lyne's Trust* (1) is untouched as an authority. It is a question of intention, having regard to the provisions and object of the Act.

JOYCE J. This is the case of a policy effected under s. 10 of the Married Women's Property Act, 1870. [His Lordship read the section, and continued:—] The policy is expressed to be effected by George Griffiths "for the benefit of his wife, or if she be dead between his children in equal proportions."

(1) L. R. 8 Eq. 65.
(2) [1899] 1 Ch. 336.
(3) (1864) 10 L. T. 184.
(4) (1801) 6 Ves. 345; 5 R. R. 322.
(5) (1870) L. R. 9 Eq. 191.
(6) (1887) 34 Ch. D. 511.
(7) [1896] 2 Ch. 173.

JOYCE J. 1903 GRIFFITHS' POLICY, *In re.*

Now the case of *In re Browne's Policy* (1) was different. That was under the Married Women's Property Act, 1882, and the policy was expressed to be for the benefit of the assured's wife and children, and not, as here, for the benefit of wife or children. I agree with what the learned judge said in the course of his judgment: "Regarding the case apart from the language of the Married Women's Property Act, 1882, one is met by the presumption, which is rather one of common parlance and common sense than of law, though it has been recognised by legal authority, that a married man speaking of his wife intends his wife at that time, and does not contemplate one whom he may marry after her death, and the observation holds good respecting allusions by another to a given man's wife." In this particular case I think the presumption is stronger, because the words are, "if she be dead," and those words seem to point to the wife who was living when the policy was effected. But counsel for the second wife relied upon the decision in *In re Lyne's Trust* (2), where the testator gave a legacy to his son's wife (if she should survive him) and all the children of his son equally, and the Vice-Chancellor, notwithstanding the words "in case she should happen to survive him," held that the second wife was entitled. As was pointed out by Stirling J. in *In re Drew* (3), the case of *In re Burrow's Trusts* (4) was not cited in the argument before the Vice-Chancellor. In *In re Burrow's Trusts* (4) there was a gift to the testator's brother, and after his death to his children, followed by a direction that if the wife of the brother should survive her husband she should receive the rents and profits for her life, Kindersley V.-C. held that the wife meant was not the second wife. I gather from what Stirling J. said in *In re Drew* (3) that he agreed rather with *In re Burrow's Trusts* (4) than with *In re Lyne's Trust* (2), and I prefer to follow *In re Burrow's Trusts*. (4) Accordingly, I hold that "wife" here means the wife at the time the policy was effected, and, consequently, that the widow can take nothing.

Then with regard to the children there was a clear decision

(1) Ante, pp. 188, 190.
(2) L. R. 8 Eq. 65.
(3) [1899] 1 Ch. 336.
(4) 10 L. T. 184.

in *In re Seyton* (1), where North J. said (2): "I may say at the outset that I think it clear that, whatever the children take, they take as joint tenants inter se, and that the child who died in 1874 may be disregarded. The fact that the policy was an immediate declaration of trust would not prevent the children born subsequently to its date, but before the trust fund came into existence, taking as joint tenants with those already born." That appears to me to be not only sound good sense, but in accordance with principle, and, applying it to the present case, I hold that the subsequently born children of the first marriage are entitled to take equally with those born before the policy was effected; and I can see no reason why the child of the second marriage should not also be included. The fund will accordingly go to the nine children as tenants in common.

Solicitors for all parties: *J. Banks Pittman.*

(1) 34 Ch. D. 511. (2) 34 Ch. D. 513.

G. A. S.

FARWELL J.

1903

Feb. 6, 7, 11.

In re WAUGH.
WAUGH *v.* CRIPPS.

[1902 W. 3863.]

Will—Construction—Gift of Realty to "A. and his Heirs"—Gift over if A. "die without an Heir"—Estate Tail—Ultimate Gift to "Survivor's Heir or Heirs"—Contingent Remainder.

A testator gave his two cottages, Nos. 9 and 12, Chapel Street, Sheerness, to his daughter C. G. for life, "after her death No. 12 to go to her youngest daughter E. G. and her heirs, and No. 9 to go to her son W. G. and his heirs, if either the said E. G. or W. G. should die without an heir their share is to go to the survivor's heir or heirs."

E. G. died in 1891, a spinster; and W. G. died in 1897, a bachelor. C. G. died in 1902:—

Held, that E. G. and W. G. took estates tail in the cottages devised to them respectively:

But *held*, that the gift over to "the survivor's heir or heirs" was a gift to the heirs general of the survivor and a contingent remainder, which took effect as to the cottage devised to E. G. in tail.

ORIGINATING SUMMONS.

Edward Waugh by his will dated December 30, 1862, after divers bequests and devises, gave the residue of his real and personal estate to his wife Deborah Waugh, who predeceased him.

By a codicil dated August 13, 1866, the testator, after divers specific devises, gave the two cottages, Nos. 9 and 12 in Chapel Street, Sheerness, to his daughter Catherine Graham, "after her death No. 12 to go to her youngest daughter Elizabeth Graham and her heirs, and No. 9 to go to her son William Graham and his heirs, if either the said Elizabeth or William should die without an heir their share is to go to the survivor's heir or heirs."

The testator died on August 18, 1866, and his said will and codicil were duly proved.

Elizabeth Graham died in 1891, a spinster and intestate; and William Graham died in 1897, a bachelor, but leaving a will whereby he devised a moiety of his real estates to the defendant Annie Cripps, the wife of the defendant W. Cripps,

and the other moiety he devised to a person under whose will it was now vested in the defendant W. Cripps. The defendant Annie Cripps was also one of the co-heiresses-at-law of William Graham.

Catherine Graham, the life tenant of the two cottages, died in April, 1902.

The plaintiffs were the heirs in gavelkind of the testator Edward Waugh, and the questions for the determination of the Court were—(1.) what interest Elizabeth and William Graham respectively took under the above devises to them in the said codicil; and (2.) whether, in the events that had happened, there was an intestacy as to the two cottages.

It was arranged that the question whether there was an intestacy as to the cottage No. 9, Chapel Street, should stand over, all the necessary parties not being before the Court.

Hon. F. Russell, for the plaintiffs. The gift to Elizabeth and William in the first instance is a gift to each in tail, because the word "heirs" means "heirs of the body," by force of the rule that where there is a gift to A. and his heirs, but if A. dies without an heir then to B., who is capable of being heir to A., then A. takes an estate tail. Here, William was in the line of descent and capable of being heir to Elizabeth, and the rule applies: Jarman on Wills, 5th ed. vol. ii. p. 1175. As to the gift over, that was a contingent remainder which took effect on the death of Elizabeth, and in that also the word "heirs" should be construed "heirs of the body." In this codicil the testator has used the word "heirs" seventeen times. In sixteen of them it means, under the rule above mentioned, "heirs of the body," and it is submitted that in the seventeenth instance in this gift over the same construction should be placed upon it: *Simpson* v. *Ashworth* (1); *In re Birks.* (2) Under the circumstances, therefore, there is an intestacy as to Elizabeth's cottage, and the plaintiffs are entitled.

Fischer Williams, for the defendants. I do not dispute the rule, but I contend that it does not apply here. The rule is stated in Fearne on Contingent Remainders, 10th ed. vol. i.

(1) (1843) 6 Beav. 412. (2) [1900] 1 Ch. 417.

FARWELL J. 1903 WAUGH, *In re.* WAUGH *v.* CRIPPS.

p. 466: "If the person to whom the limitation over is made, be a relation of and capable of being collateral heir to the first devisee, in that case the first devisee takes only an estate tail." No doubt William was capable of being the heir to Elizabeth, but the gift over was not to William but to the heirs of William, and the heirs of William could not possibly be the heirs of Elizabeth, the first taker, because William survived Elizabeth. I submit, therefore, that Elizabeth and William took estates in fee in the first instance: *Tilburgh* v. *Barbut* (1); *Doe* v. *Smeddle* (2); and there is no difference between a deed and a will in these cases: Elphinstone on Interpretation of Deeds, p. 234; Hawkins on Wills, p. 177. But if this construction is wrong, there is at any rate a good gift over to the heirs general of William.

Hon. F. Russell, in reply.

Cur. adv. vult.

Feb. 11. FARWELL J., after stating the facts, continued:—Under these circumstances the first question that arises is, What estates did Elizabeth and William Graham take in the houses respectively devised to them? I am of opinion that they took estates tail. The general rule of construction is well settled, and is thus stated in Fearne on Contingent Remainders, 10th ed. vol. i. p. 466: "But we are to remember, however, that although a devise over after a dying without heirs, is in general void, yet this rule is not without exceptions; for if the person to whom the limitation over is made, be a relation of and capable of being collateral heir to the first devisee, in that case the first devisee takes only an estate tail." But it is argued that the rule is confined to the case where the object of the gift over is or may be the collateral heir, and that in the present case it is obviously impossible that the children of a brother who survives his sister, or of a sister who survives her brother, can ever be heirs to the predecessor. But the rule is merely a rule of construction—not a rule of law—and has been established to give effect to the intention for reasons applicable to the present case. Thus, in

(1) (1747) 1 Ves. Sen. 89. (2) (1818) 2 B. & Al. 126; 20 R. R. 377.

Nottingham v. *Jennings* (1) Holt C.J. says: "I agree, if the devise over had been to a stranger, it had been void, and B. had taken a fee simple; but, in the present case, the word 'heirs' can import nothing more than issue; for how could he possibly die without heir, living the other brother?" In the present case I ask the same question: How could either Elizabeth or William die without an heir if the other survived? But the gift over assumes the existence of the one at the death of the other, and the title of the heirs of the survivor is contingent on evidence of survivorship of their ancestor. If it is absurd to suppose that the testator meant heirs general in a gift to A. and his heirs, because he has given the property over in the event of failure of heirs general to a person who may be such heir general, it is equally absurd to suppose that he meant heirs general when the gift over to a stranger is made to depend on the existence of one who is or may be heir general at or after the total failure of heirs general. In my opinion, the rule as stated in Fearne may be amplified thus: if the person to whom the limitation over is made be capable of being collateral heir to the first devisee, or if the event on which the gift over is made necessarily depends on the existence of a collateral heir of the first devisee on such first devisee's death, the first devisee takes only an estate tail.

The next question is, What is the meaning of the words "the survivor's heir or heirs"? I do not feel at liberty to alter the meaning of these words and to read them as if they were "heirs of the body." It is argued that the testator has throughout this document used the word "heirs" when he meant "heirs of the body"; but this is by force of the several gifts over under the rule of construction to which I have already referred. In this case I have no gift over, and the word "heirs" is not a flexible word like "issue," which was the word in *In re Birks*. (2) The gift was contingent on the death of the survivor during the lifetime of the tenant for life, for nemo est hæres viventis, and if the tenant for life had died first, the gift would have failed for want of a particular estate to support it. But in the event that has happened it has

(1) (1700) 1 P. Wms. 23, 25. (2) [1900] 1 Ch. 417.

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taken effect, and I can find nothing to justify me in altering the plain meaning of the words. The alternative phrase "heir or heirs" is too narrow a foundation to build an argument upon. Mr. Russell relied upon *Simpson* v. *Ashworth* (1); but, in my opinion, the reasoning on which Lord Langdale's decision is based has no application to the present case. The will there contained divers gifts to sons and daughters and their heirs, which by virtue of the rule above mentioned were held to be gifts in tail, and then there was a gift over of a daughter Catharine's share "to my sons and daughters that have heirs share and share alike." Lord Langdale held that the testator intended the same quantity of estate to go over which he had given in the first instance—that is, he inferred from the fact that all the original gifts were to the sons and daughters in tail an intention that the share of a daughter given over to others in the event of her death "without lawful issue" was given for a similar estate. But I have no such indication of intention in this case. The heirs of the survivor are not objects of any prior gift. In order to make Lord Langdale's decision apply, the gift here should have been "to the survivor, his or her heirs or heir," instead of "to the heirs or heir of the survivor."

Solicitors for plaintiffs: *Sismey & Cook, for J. Copland & Son, Sheerness.*

Solicitors for defendants: *Crossman, Prichard & Co., for M. & D. Blome-Jones, Sheerness.*

(1) 6 Beav. 412.

H. L. F.

In re GREENWOOD. GOODHART *v.* WOODHEAD.

[1901 G. 715.]

C. A. 1903 Jan. 21, 22.

Will — Devise of Real Estate — Condition — Name Clause — Preceding Life Estate — Condition Precedent or Subsequent — Non-performance of Condition — Remainder in Fee — Forfeiture — Vesting.

A testator, who died in 1853, devised his real estate upon trust for his daughter for life, and after her death for her children; and if she should have no child he devised his real estate to N. in fee, on condition that in case the testator's wife should be then living she should have the use for the then remainder of her life of the testator's residence, and on further condition that N. should "take and use" the testator's name only, but subject to the payment of certain legacies which the testator bequeathed only if his daughter should have no child, and should be payable at her death exclusively out of the estates devised to N.

The testator's daughter and N. both survived the testator, but his wife was dead. The daughter, who was now in her fifty-ninth year, was married, but had had no children. N. died in her lifetime intestate, without having taken the testator's name:—

Held, upon the construction of the will, that the condition requiring N. to take and use the testator's name was a condition subsequent, that is, a condition to operate only upon N. becoming entitled to the possession of the estate by the death of the daughter without children, and not before; and that as he had been prevented from performing it by the act of God, the estate would, on the death of the daughter without children, vest absolutely in his legal personal representative freed from the condition.

Decision of Joyce J., [1902] 2 Ch. 198, reversed.

If a condition attached to a devise is capable of being construed either as a condition precedent or as a condition subsequent, the Court will prefer the latter construction.

APPEAL from the decision of Joyce J. (1)

James Newsome Greenwood, by his will dated May 24, 1853, devised his real estate to trustees upon trust for his daughter Jane during her life for her separate use, and after her death upon trust for her children or remoter issue born in her lifetime as she should appoint, and, in default of appointment, upon trust for all her children, or her only child, if but one. And,

(1) [1902] 2 Ch. 198.

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GREENWOOD, *In re.* GOODHART *v.* WOODHEAD.

if she should have no child, the testator devised his real estate to his cousin, William Alexander Newsome, "his heirs and assigns for ever," on condition nevertheless that in case the testator's wife should be then living she should have the use and enjoyment for the then remainder of her life of the dwelling-house in which the testator then resided, "and on further condition nevertheless that he take and use the name of Greenwood only, and subject to the payment of the following legacies" (mentioning them), which legacies the testator declared were bequeathed only if his said daughter should have no child, and should be payable at her death exclusively out of the estates lastly thereinbefore devised to the said W. A. Newsome and his heirs.

The testator died on August 11, 1853, and his wife was also dead.

The testator's daughter Jane was now the wife of Jeremiah William Woodhead. She had had no issue and was, at the date of the summons hereinafter mentioned, in her fifty-ninth year.

W. A. Newsome never took the name of Greenwood and died intestate on November 5, 1855, leaving his only son, Colonel W. Newsome, his heir-at-law. Colonel Newsome died on July 26, 1900, leaving a will. The plaintiff was his administrator with the will annexed, and for the purpose of passing his administration accounts it became necessary (as it was alleged) to ascertain the value of the interest, if any, which Colonel Newsome took in the real estate devised by the will of J. N. Greenwood.

An originating summons was accordingly taken out by the plaintiff against Mrs. Woodhead, the heiress-at-law of J. N. Greenwood, and her husband, and the trustees of J. N. Greenwood's will, to obtain a declaration that the plaintiff, as the legal personal representative of Colonel Newsome, was entitled to the real estate devised in trust by that will in remainder after the death of Mrs. Woodhead without children, subject to the payment of the legacies therein mentioned.

The summons came before Joyce J., the question for argument being whether the condition as to taking the name of Greenwood was a condition precedent or a condition subse-

quent. On the part of the plaintiff it was admitted that if the condition was a condition precedent the devise to W. A. Newsome failed altogether; but it was contended that the condition was a condition subsequent, operating only upon the death of Mrs. Woodhead without leaving a child, and that as the performance of the condition became impossible by the act of God, and not by the mere default of the devisee, the devise took effect.

Joyce J. held (1) that, whether the condition were precedent or subsequent, its performance had not been rendered possible by the act of God, since the condition was one to be performed by the devisee at any time during his life, and that as he had failed to perform it, the devise to him failed.

The plaintiff appealed.

The appeal was heard on January 21 and 22, 1903.

Haldane, K.C., *Badcock, K.C.*, and *E. S. Ford*, for the plaintiff. First, it is submitted that the condition as to taking and using the testator's name is a condition subsequent. The word "use" points to a continued use, and is in favour of the construction that the condition is subsequent. The Court always, if possible, construes a condition as subsequent and not as precedent: *Woodhouse* v. *Herrick* (2); *Egerton* v. *Earl Brownlow* (3); *Lady Langdale* v. *Briggs*. (4) The reasonable construction is that the obligation to take the testator's name did not arise while the remainder was contingent, i.e., during the life of the tenant for life. And as the devisee died before the tenant for life the performance of the condition has become impossible.

The question is, What did the testator mean? Now, considering that Newsome was not to take any estate at all until the death of the testator's daughter without children, it is a most unreasonable construction of the clause to say that he must take and use the name before that event happened. What the testator evidently desired was that his name should be

(1) [1902] 2 Ch. 198.
(2) (1855) 1 K. & J. 352, 359, 360.
(3) (1853) 4 H. L. C. 1, 182–3, 189.
(4) (1856) 8 D. M. & G. 391, 412, 429, 430–1.

C. A. 1903 GREENWOOD, *In re.* GOODHART *v.* WOODHEAD.

associated with the estate: he could never have intended that Newsome should take the name before he had the estate. The condition is that he shall take "and use" the name; there would be no object in his "using" it except as possessor of the estate. As he died before the event happened upon which he would have come into possession of the estate, the fulfilment of the condition, which, as we submit, could only operate on that event, became impossible; and the well-established rule of law is that if a condition becomes impossible by the act of God it is discharged and gone for ever, and the estate is absolute: Sheppard's Touchstone, 7th ed. p. 157.

Secondly, What is the nature of the limitation to W. A. Newsome? Joyce J. has construed it as giving him a vested remainder, and therefore an estate which could be operated on by the condition. We submit that construction is erroneous. It is either a contingent remainder or an executory limitation: *Loddington* v. *Kime* (1); Fearne's Contingent Remainders, 10th ed. vol. ii. p. 272. But even if Newsome's estate was a vested remainder, that is really immaterial if our view is the correct one, as we submit it is, that the condition only came into effect when he took a vested estate in possession.

[ROMER L.J. It seems absurd to suppose that the testator meant that the devisee was to take "and use" the name before he succeeded to the estate.

COLLINS M.R. In *Lady Langdale* v. *Briggs* (2) Knight Bruce L.J. thought it unreasonable and eccentric to require a devisee to take and use a name before succeeding.]

That is so. It is impossible to suppose that such was the testator's intention here, and therefore we submit that as, in the events which have happened, the condition became impossible of fulfilment, the estate passed freed and discharged from it.

Neville, K.C., *Hughes, K.C.*, and *E. Clayton*, for Mrs. Woodhead, the testator's heiress-at-law. The question here is solely one of intention; and whether the condition is precedent or subsequent—that is, whether it was to be performed before or after the death of the testator's daughter without issue—is,

(1) (1697) 1 Salk. 224; 1 Ld. Raym. 203. (2) 8 D. M. & G. 391, 412.

according to our view, immaterial, though it would seem, upon the authorities, to be a condition precedent rather than subsequent: *Gulliver* v. *Ashby* (1); *In re Farrer and Champion* (2); 2 Jarman on Wills, 5th ed. p. 847. The intention of the testator is quite consistent with reading the condition as either precedent or subsequent. It is a condition to be performed during the life of the devisee, and, the life having dropped before the fulfilment of the condition, he cannot take the estate, whether it is a condition precedent or subsequent.

The Court should give effect to the testator's intention, and not defeat it by giving a secondary meaning to the word "condition," which has a well-understood legal meaning. If the condition is properly applicable to the case, the Court will enforce it. It is not open to the Court to say whether the condition is reasonable or not: effect must be given to the strict letter of the condition, namely, that the devisee must take and use the name; it is obvious that he did not take and use it, though he had his lifetime in which to do so, no time being fixed by the testator for the purpose. Any estate, whether vested or contingent, is capable of being operated on by a condition. To say that the condition is to be performed "upon his coming into possession" is to read into the will words that are not there. From the words the testator has used it is clear that the obligation to take the name rests upon the devisee during his life: whether the condition is precedent or subsequent is really immaterial.

[ROMER L.J. Suppose the daughter had died without issue in the lifetime of the testator, could it be said that he meant that Newsome must have taken the name?]

The testator was not contemplating that case. The devisee would not in that case have an estate or interest at all. The intention is that the devisee shall not take or keep the estate unless he has taken the name, and the obligation to take it is not altered by his death before the happening of the event on which, if then living, he would have taken possession. This is not a case in which the condition, assuming it to be a condition subsequent, has become impossible by the act of God so as to

(1) (1766) 4 Burr. 1929, 1941. (2) W. N. (1887) 202.

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relieve the donee from it. The clause is not a "name and arms" clause, under which the devisee has to go through various proceedings and obtain certain consents in order to use armorial bearings: taking a "name" is entirely in the power of the person who has to fulfil the condition.

COLLINS M.R. The question in this case really turns upon what was the intention of the testator as disclosed by the terms in which he himself has imposed the condition that is the subject of this inquiry; the question being, in effect: Is the condition a condition precedent, or is it a condition subsequent? And, if it is a condition subsequent, subsequent to what date? If it is a condition precedent, it is conceded on all hands that, as it has not been performed, Mr. Newsome never became entitled to the estate. If it is a condition subsequent, another question arises, namely, What, on the true construction of the will, is the date to which it is subsequent? Now the wording of the condition is this. After making a provision for his daughter and her children, the testator says this: [His Lordship then read the devise containing the condition in question, and proceeded:—]

The question is whether Mr. W. A. Newsome, having died in the lifetime of the tenant for life, and not having taken the name of Greenwood, failed to perform the condition, and therefore did not become entitled under the devise. Now the learned judge has held that, whether the condition was to be regarded as a condition precedent or as a condition subsequent, as to which he gave no decision, though he seemed disposed to regard it as a condition subsequent, it was a condition the non-performance of which was not excused by the act of God, namely, the death of Mr. Newsome during the lifetime of the tenant for life, the ground of his so holding being that there was a vested estate in remainder in Newsome, and that he had it in his power, had he been so minded, at any time after the estate became vested in him in remainder, although not in possession, to take the name, and thus perform the condition, so that, as he has failed to perform it, the estate has gone from him. Now that depends, I think, entirely upon the

construction of the will, and upon what was the intention of the testator in creating this condition. Upon the authorities cited to us, it seems to me to be clear law that, in a devise of real estate with a condition, where the intention of the testator, as evidenced by the words he has used, is more consistent with the inference that he intended the condition to be a condition subsequent rather than a condition precedent, then, if the words are capable of admitting both constructions, the Court ought to hold the condition to be a condition subsequent.

Now in this case it seems to me that the words in which the condition is framed point to this—that the occasion the testator is dealing with is the death of his daughter, the tenant for life, and that, on the death of the tenant for life, and not till then, this condition is to come into force. It is obvious, in my opinion, that the testator does not regard the condition as coming into force till that time. He is dealing, first of all, with what he calls a "condition" as to the wife. Strictly speaking, that is not a condition at all, but it is important as indicating what is the period of time in the mind of the testator. The whole is one sentence, and the time referred to in the first part of it, affecting the provision for the wife, seems to me to be the same time that is dealt with in the subsequent condition, namely, the condition affecting the right of Mr. Newsome to take the estate. Reading the whole sentence, it seems to me clearly to point to his taking and using the name as soon as and after he comes into possession, and not before. If that be the fair meaning of the condition, it seems to me that, both in the words used and in the common-sense view of the circumstances, what the testator desires is that the person who takes his estate—that is, the person who becomes, not the owner in remainder, but the owner in possession—shall bear his, the testator's, name. That is the object he is seeking to carry out; and it seems to me that he could not have intended, and that it is very unlikely he did intend, that there should be any obligation or inducement whatever imposed upon the devisee to take his name before the occasion arose for taking it, that is, when he came to hold this estate in

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possession. He is to take and use the name just as he is to take and use the estate: as it seems to me, the two are placed together. Joyce J. says that it was competent for Mr. Newsome to have taken the name before he came into possession. He never did come into possession; but the learned judge holds that it cannot be said that he was prevented by the act of God from taking the name, because he might have taken it during his life. Now it seems to me, and indeed it was admitted by counsel for the respondent, Mrs. Woodhead, that if, on the fair construction of this will, the obligation to perform this condition did not arise, and was not intended to arise, until after possession was taken, then it was not ad rem at all to point to the fact that there was the opportunity of doing the act before the occasion arose for doing it. That is not a matter with which we are concerned at all. The obligation to do the act, and the immunity from doing it, are both measured by the same standard, namely, What are the limits of the condition—when does the obligation arise under the condition? It seems to me that when you once come to the conclusion that the condition is intended to operate only after the devisee comes into possession, the occasion for any excuse for his not performing it arises then and not till then, and that it is unnecessary to consider whether he could or could not have performed it before. The question is, Is he excused from doing the act by the act of God happening before the time at which the testator contemplated he should do it? If that is the standard, obviously he was incapacitated from doing it, because he died before ever coming into possession.

It seems to me, therefore, that, on the true construction of this will, this condition is a condition subsequent, and that the devisee was prevented from performing it by the act of God; and that consequently he or his representative is in a position to retain the estate.

On these grounds I do not think that the decision of Joyce J. can be supported, and therefore the appeal must be allowed.

ROMER L.J. I also am of opinion upon this will that the condition upon which the question, the subject of this appeal,

turns was a condition subsequent in the truest sense of the term, and that this appeal must succeed. That is to say, I think the testator only contemplated Mr. Newsome doing something upon or after the death of the testator's daughter without leaving children. Both the wording and the position of the condition support that view. The gift is to Mr. Newsome on the death of the testator's daughter without leaving children, first, on condition (if it can be called a condition) that in case the testator's wife shall be then living she shall have the use and enjoyment of the testator's dwelling-house for the then remainder of her life, and then on the further condition that Mr. Newsome shall take and use the name of Greenwood only, which, to my mind, points to something he is then to do. Then the clause goes on, "And subject to the payment of the following legacies" —again clearly pointing to something that he is to do after that time. The position and the wording of the condition, to my mind, shew that, as I have said, it was, strictly speaking, a condition subsequent, that is to say, a condition solely intended to refer to, and dealing with, something that he was to do when he became possessor of the estate.

Now I think that is borne out by considering this—What could have been the only object and intention of the testator? It appears to me that he only wanted Mr. Newsome to take and use the name because he contemplated his becoming the owner of the estate. He only wanted him to use the name as and when he became owner of the estate. There is nothing to shew that Mr. Newsome was at any time to do anything irrespective of the estate, or to do anything at a time when he never could have come into possession of the estate. It seems to me that the testator was in no wise concerning himself with what Mr. Newsome might do with regard to using or not using the name before he came into possession of the estate. I think it was because Mr. Newsome was to come into possession of the estate that the testator then required that he should, as the possessor of that estate, take and use the name; and, as I have said, I think that is borne out by the other considerations in the case. At any rate, to my

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mind, on the construction of this will, that appears to me to be what the testator meant and has said.

I cannot help thinking that a condition of this kind ought to be construed somewhat strictly; and so construing this condition it appears to me that, seeing this condition was one which under the circumstances could not have been complied with, the result is that the estate is freed from the condition.

I therefore think that this appeal ought to succeed, and that the decision of the learned judge in the Court below should be reversed.

COZENS-HARDY L.J. I agree, and I have very little to add. Assuming that this is a condition, it seems to me to be plainly a condition subsequent. Now the condition is, as Romer L.J. has pointed out, in the midst of a series of clauses requiring certain things to be done after the estate fell into possession—not things to be done before possession was acquired, but things to be done after. Now, if this is a condition subsequent, it is subsequent to what? It is subsequent, it seems to me, to the actual enjoyment in possession of the estate. There is no obligation whatever upon Mr. Newsome to do anything until after the event, which might never have happened, of the estate becoming an estate in possession; and I doubt very much indeed whether any act done by Mr. Newsome before he came into possession would in any way be relevant to the performance of the condition. If, for instance, Mr. Newsome had in the daughter's lifetime taken the name of the testator, and had then abandoned it, and had survived the daughter and then come into possession of the estate, and had done nothing afterwards with regard to the name, as at present advised I do not think there would have been a fulfilment of the condition. It seems to me to be plain that there is only one time at which this condition is to be complied with, namely, the time when Mr. Newsome should come into possession. If that be the true construction, as in my opinion it is, the appeal is right and the judgment of the Court below must be reversed.

[Their Lordships made a declaration that according to the true construction of the will, in the events which had happened, the real estate and the proceeds of sale of any real estate on being sold would, on the death of the daughter without children, vest absolutely freed from the condition.

Liberty to apply. Costs of all parties as between solicitor and client, both on the appeal and below, to be paid out of the estate.]

Solicitors: *Robins, Hay, Waters & Hay; Jaques & Co., for Watts & Son, Dewsbury.*

G. I. F. C.

DEVONPORT CORPORATION *v.* TOZER.

[1901 D. 298.]

Local Government—Urban Authority—By-laws—Infringement — Erection of Houses abutting on Public Highway—"New Street," Laying out—Injunction—Public Body—Statutory Remedy—Justices, Proceedings before — Information, Proceeding by—Attorney-General, Absence of—Jurisdiction.

The defendants were the owners of a triangular piece of land within the plaintiffs' borough. Two sides of the triangle abutted upon public highways within the borough. The defendants, in pursuance of a building scheme, commenced erecting houses on their land fronting the highways. The plaintiffs alleged that the defendants were laying out the highways as "new streets" which did not comply with the requirements of the borough by-laws as to width, and they claimed, first, an injunction, and, secondly, a declaration that the plaintiffs were entitled to remove or pull down any work begun or done by the defendants in contravention of the by-laws. The by-laws, which were framed under the Public Health Act, 1875, prescribed a penalty for infringement, to be recovered by summary proceedings, and provided that the plaintiffs might, subject to any statutory provision in that behalf, remove, alter, or pull down any work begun or done in contravention of the by-laws:—

Held, affirming Joyce J., [1902] 2 Ch. 182, (1.) that the facts were not sufficient to justify the inference that the defendants were laying out the highways as "new streets" within the meaning of the by-laws; and (2.) that the action was not maintainable in the absence of the Attorney-General.

Attorney-General v. *Ashborne Recreation Ground Co.*, ante, p. 101, approved.

APPEAL by the plaintiffs from the decision of Joyce J. (1)

The facts are sufficiently stated in the former report.

(1) [1902] 2 Ch. 182.

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Macmorran, K.C., Hughes, K.C., and *R. J. Parker*, for the plaintiffs. The questions for decision are two-fold: (1.) whether the defendants, in proceeding to erect houses on their land along the two highways, Ham Lane and Tavistock Road, have begun to lay out those highways as "new streets," and are therefore bound to comply with the plaintiffs' by-laws as to new streets by making those highways respectively of the required width; and (2.), assuming that the defendants are so bound, and that they thus give the plaintiffs a right of action, whether the plaintiffs can proceed by action for injunction, it being suggested that they have a statutory remedy in such cases, and that they are limited to that remedy.

Upon the first question they adopted the same argument and referred to the same cases as in the Court below, citing in addition *Attorney-General* v. *Rufford & Co., Ld.* (1), and *Richards* v. *Kessick.* (2)

Upon the second question they cited, in addition to the cases referred to upon it in the Court below, *Attorney-General* v. *Ashborne Recreation Ground Co.* (3); Public Health Act, 1875, ss. 157, 158, 183; Housing of the Working Classes Act, 1885, s. 7. *Wallasey Local Board* v. *Gracey* (4); and *Tottenham Urban Council* v. *Williamson & Sons* (5), cited on behalf of the defendants in the Court below, were cases of public nuisance, and therefore cases to which the Attorney-General must be a party. *Attorney-General* v. *Logan* (6), also cited by the defendants, shews that a local authority may themselves maintain an action for damages for a nuisance affecting property of which they are owners. *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (7), on which the learned judge below relied, was a case of interference with a building line, and has no bearing upon the question whether a local authority has a remedy by injunction for breach of its by-laws. That question was not discussed. *Institute of Patent Agents* v. *Lockwood* (8), also referred to by the learned judge, was a different case from the present. That case would only have

(1) [1899] 1 Ch. 537.
(2) (1888) 57 L. J. (M.C.) 48.
(3) Ante, p. 101.
(4) (1887) 36 Ch. D. 593.
(5) [1896] 2 Q. B. 353.
(6) [1891] 2 Q. B. 100.
(7) [1898] 2 Ch. 331.
(8) [1894] A. C. 347.

been applicable if it could have been shewn that the plaintiffs had some duty to perform, but there was no evidence to that effect. *Barraclough* v. *Brown* (1) was, as the head-note shews, a peculiar case. *St. Pancras Vestry* v. *Batterbury* (2), *Doe* v. *Bridges* (3), and *Great Western Ry. Co.* v. *Sharman* (4), were all actions to enforce pecuniary obligations—an exception to the general rule. It is the duty of a local authority to enforce its by-laws: it has no dispensing power: it cannot consent to an infringement of its by-laws: *In re McIntosh and Pontypridd Improvements Co.* (5) Moreover local authorities are entitled to be protected in carrying out their duties, and they have no sufficient protection if they cannot proceed by injunction for breach of their by-laws.

Danckwerts, *K.C.*, and *A. Glen*, for the defendants, on the first point, adopted the same arguments, and referred to the same cases as in the Court below, citing in addition *Reg.* v. *Fullford.* (6)

[They also referred to ss. 4, 154, 157, 158, 182, 184, 251, 252, and 253 of the Public Health Act, 1875.

Upon the second point they cited *Reg.* v. *Walker* (7), and relied upon the decision of the House of Lords in *Institute of Patent Agents* v. *Lockwood* (8) as establishing that the remedy of a local authority for breach of its by-laws was not by injunction but by summary prosecution. They were then proceeding to argue that the plaintiffs were not entitled to sue at all without the Attorney-General, and that this was not a case in which even the Attorney-General could sue, when they were stopped by the Court.]

COLLINS M.R. This is an appeal from the decision of Joyce J., who decided two questions. First of all, he held that the particular by-laws in this case did not apply under the circumstances; but, secondly, he held that this was an action which could not be maintained by the local authority otherwise

(1) [1897] A. C. 615.
(2) (1857) 2 C. B. (N.S.) 477.
(3) (1831) 1 B. & Ad. 847; 35 R. R. 483.
(4) (1892) 61 L. J. (Q.B.) 600.
(5) (1891) 61 L. J. (Q.B.) 164.
(6) (1864) 33 L. J. (M.C.) 122.
(7) (1875) L. R. 10 Q. B. 355.
(8) [1894] A. C. 347.

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than in the name of the Attorney-General; that the Attorney-General was not a party to the cause, and that that in itself was a complete answer. If the learned judge is right in holding that this was not an action that could be maintained by the local authority without the Attorney-General, this appeal must fail.

These proceedings are not taken for the penalty imposed by the by-laws. They are taken on the general right of a public body who are trying to put in suit a claim for the breach of a statute. This point has been carefully considered by Buckley J. in a very elaborate judgment in the case of *Attorney-General* v. *Ashborne Recreation Ground Co.* (1), in which he has covered the whole of the law, as it seems to me, upon this point. I do not think I could usefully add anything to the reasons there given, namely, that where there is a public wrong, and where the local authority who have certain special rights to sue in their own name for certain special remedies, but have not done so, and are trying to put in suit a public wrong, they must do it in the recognised way, namely, at the suit of the Attorney-General. In this case the plaintiffs have attempted to do it without the intervention of the Attorney-General, and, for the reasons given by Buckley J. in the case I have mentioned, I am of opinion that they cannot proceed in the absence of the Attorney-General. That is really enough to dispose of this case.

With regard to the other part of the case, which was very elaborately argued on both sides, I do not think it is necessary to say more than that I see no reason for differing from Joyce J. The question is purely one of fact, namely, whether we are bound to draw an inference from the acts done by these particular owners, the defendants, who are building on the land in question, that they are making or laying out a new street. I do not say that it might not be possible to draw the inference that they are: I think there is some evidence of that. On the other hand, no one can contend that it is a necessary inference, and much less an inference of law from the facts, that they are laying out a new street; and the question being, as it unques-

[(1) Ante, p. 101.

tionably is, a question of fact, it seems to me that the learned judge was perfectly justified in drawing the inference that he did draw, namely, that the facts are not sufficient in a matter of this kind, involving such large consequences, to enable the Court to arrive at the conclusive inference of fact that these defendants are laying out a new street. I think that, in a case of this kind involving such large consequences, to compel these private owners, as the result of our decision in the appellants' favour, to buy extra land for the purpose of making the street as wide as under the by-law it ought to be, would be such a very grave consequence that we ought to look with the greatest possible care to see whether all the facts are made out which would impose such a liability upon them. We find a plan which, if carried out, will undoubtedly involve the construction of a large number of houses in a row; we find that three houses are practically finished, but not finished in the sense of being ready for occupation, nor is there as yet any occupier, and we find that those houses are separated from the existing highway by a strip of land which belongs to the building owners, which is fenced off from the highway, and through which there is no aperture for persons to pass out from the houses, except through such gaps in the fence as were made for introducing building materials for the purpose of carrying out the building scheme.

Under those circumstances it seems to me it is quite impossible to say that the strip in front of these houses has, in any sense, become a street. It may hereafter, for all I know, become a street, or part of a street, but we are asked at the present moment to say the defendants are engaged in forming a new street. The learned judge has come to the conclusion that they are not, and it seems to me that the difficulties of holding that they are are greater than the difficulties of drawing the inference that they are not. I see no reason on this part of the case to differ from the inference of fact drawn by the learned judge, and, as I have said, on the other part of the case it is quite conclusive against the appellants, if the presence of the Attorney-General as a party to the action is essential, as, in my judgment, it is. For these reasons I think the appeal must be dismissed, and with costs.

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ROMER L.J. I am of the same opinion. The decision of Joyce J., on the question of whether this action would lie without the Attorney-General being a party, appears to me to be a perfectly right decision. It is to be borne in mind that the plaintiffs here have no proprietary rights which are being interfered with by what is being done by the defendants. The plaintiffs, no doubt, have powers conferred upon them to make by-laws, but that alone gives them no special rights over other bodies, or other members of the public, as to initiating proceedings to enforce those by-laws. Such powers as the plaintiffs, the public body, have to enforce by by-laws, must be conferred upon them by special powers given to them by statute, and, in fact, you do find special powers here given; and, except in so far as special powers are given, they have no inherent right to take proceedings. And I think it is rather to be deprecated that public bodies such as the plaintiffs in this case should be at liberty, without the leave of the Attorney-General, to commence expensive proceedings, such as these, at their own will. The fact that you do find a special power given to a public body, such as the plaintiffs, to initiate proceedings at law, or in equity, in certain special cases, is an additional proof that the Legislature never contemplated that, apart from special legislative permission, they should have a right to take any proceedings they might think fit for the purpose of enforcing the by-laws, apart from the special power conferred upon them by statute.

With regard to the other point, I think Joyce J. also came to a right conclusion. I need not go through these by-laws. In the course of the argument I ventured to point out that there were several by-laws which had to be construed together, and which throw a light upon the special by-law which is said to have been infringed by the defendants in this case. It appears to me, especially with respect to the by-law as to laying out a new street, that if you look at that by-law, coupled with the other by-laws which refer to laying out a new street, it is clear that the by-law in question is dealing with something in the nature of a physical laying out, and not what I may call a metaphorical laying out. They relate to

something to be done, or contemplated to be done, on the land in question which is to be the street. It is to be borne in mind that these by-laws have to be very carefully construed, because any infringement of them is in the nature of a criminal offence; and if the plaintiffs wish to assert that an offence has been committed or is threatened by the defendants they must shew clearly which by-law it is which is said to have been or to be about to be infringed. Looking at the by-laws upon which the plaintiffs can alone rely as supporting their views in this case, it appears to me clear, as I have said, that those by-laws do not apply to such a case as we have before us now. The defendants are not, to my mind, within the meaning of the terms of the by-laws relied upon by the plaintiffs, either laying out, or threatening at present to lay out, a new street at all. On that ground also, I think, the decision of Joyce J. was perfectly right, and that this appeal should be dismissed.

COZENS-HARDY L.J. I agree. On the point on which alone we are really deciding this appeal, I do not think I can with advantage add anything to the very careful judgment of Buckley J. in the case of *Attorney-General* v. *Ashborne Recreation Ground Co.* (1); but, if necessary, I think a very strong argument in support of his judgment is found in s. 107 of the Public Health Act, 1875, for in the only case in which there is an express power given to a local authority to cause proceedings to be taken in a superior Court of law or equity, it has been held by the Court of Appeal that the local authority cannot take such proceedings in their own name, but must proceed by the Attorney-General as relator. It would be strange indeed if any different principles should be applied where there is no express power given, but at the utmost only an implied power.

On the other point, upon which we are really not deciding this appeal, speaking for myself, I see no reason whatever to differ from the conclusion at which Joyce J. arrived. I think the appeal must be dismissed.

Solicitors: *Cunliffes & Davenport, for A. B. Pilling, Devonport; Surr, Gribble & Oliver, for J. Walter Wilson, Plymouth.*

(1) Ante, p. 101.

C. A.
1903
March 12, 13.

WATTS *v.* BUCKNALL.

[1902 W. 166.]

Company—Prospectus—Omission to specify Material Contract—Liability of Director—"Knowingly issue"—Waiver Clause—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

The prospectus of a company, formed for the purpose of acquiring and working some breweries, stated that a contract for purchase, dated December 1, 1896, had been entered into between two persons, whose names were given, one of them being a trustee for the company. It was further stated that, "during the negotiations for the purchase of the properties and the formation of the company, contracts have been entered into between various parties, with reference to the formation and promotion of the company and the subscription of its capital, but to none of which the company is a party. . . . The contracts referred to in this paragraph are, or may be, contracts within the meaning of s. 38 of the Companies Act, 1867; and, accordingly, applicants for shares are to be deemed to have notice of the said contracts, and to have agreed with the company (as trustee for the directors and other persons liable) to waive all claims, if any, against them for not more fully complying with the requirements of the said section, and allotments will only be made upon this express condition." Neither the dates of nor the names of the parties to the contracts thus referred to were stated in the prospectus.

A shareholder, who had applied for his shares on the faith of this prospectus, brought an action for damages against one of the directors, who was responsible for the issue of the prospectus, on the ground that the requirements of s. 38 had not been complied with. The defendant admitted that he had read through the prospectus, but said that he knew nothing of the nature or contents of the contracts referred to, and that he was ignorant of s. 38:—

Held, that the defendant had "knowingly issued" the prospectus within the meaning of s. 38, that he was not protected by the waiver clause, and that he was liable to refund to the plaintiff the sum which he had paid for his shares.

Decision of Byrne J., [1902] 2 Ch. 628, affirmed.

The statement in the prospectus, though it was sufficient to fix the defendant with knowledge of the existence of the contracts in question, and thus to make him liable under s. 38, as having "knowingly" issued the prospectus without specifying the contracts, was not a sufficient "notice" of the contracts within s. 38 so as to deprive the plaintiff of his remedy under that section, the position of a director and that of an applicant for shares being for this purpose entirely different.

In order that an applicant may be affected with "notice" of a contract

within s. 38, he must have notice, not only of the existence of the contract, but also of its contents.

A "waiver" clause in a prospectus of this kind cannot operate to excuse compliance with the requirements of s. 38, except under such conditions as would render a release in general terms effectual.

APPEAL from the decision of Byrne J. (1)

By the action the plaintiff claimed damages against a director of the Worcestershire Brewing and Malting Company, Limited, upon the ground that the plaintiff had applied for and received an allotment of shares in the company upon the faith of a prospectus which did not comply with s. 38 of the Companies Act, 1867, inasmuch as it did not disclose the dates and the names of the parties to certain contracts entered into prior to the issue of the prospectus.

The company was incorporated in December, 1896, for the purpose of acquiring two breweries known as Bucknall's Brewery and the Delph Brewery, together with licensed houses, plant, stock, book debts, shops, and land. The defendant had formerly been the owner of Bucknall's Brewery, but had sold it some time previously for between 40,000*l.* and 50,000*l.* In December, 1896, the prospectus of the company inviting persons to subscribe was issued. It stated that the capital of the company was divided into 13,000 5½ per cent. cumulative preference shares of 10*l.* each, and 13,000 ordinary shares of 10*l.* each. It also offered for public subscription 230,000*l.* 4½ per cent. debenture stock. The prospectus, after specifying the objects of the company and describing the properties to be purchased, stated that the purchase price payable by the company had been fixed at 440,000*l.*, in addition to which the company would pay for the stocks, stores, and book debts at a valuation in the usual way. Valuations of the properties were attached, and the prospectus also contained the following clauses: "The vendors (who promote the company, and have acquired the properties to resell at a profit) pay the whole of the expenses of the formation and registration of the company (including the issue of the prospectus and brokerage) up to the first allotment of shares, except stamp duties and the legal charges of securing

(1) [1902] 2 Ch. 628.

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the debenture stock, which will be paid by the company." "A contract for purchase has been entered into, being an agreement dated the 1st day of December, 1896, between Edward Stopford Claremont (who represents the vendors) of the one part and H. Broadbridge, as a trustee on behalf of the company, of the other part." "During the negotiations for the purchase of the properties and the formation of the company, contracts have been entered into between various parties with reference to the formation and promotion of the company and the subscription of its capital, but to none of which the company is a party. The businesses agreed to be purchased, or some of them, will be taken over subject to all existing contracts, which are of the ordinary trade character. The contracts referred to in this paragraph are, or may be, contracts within the meaning of the 38th section of the Companies Act, 1867; and, accordingly, applicants for shares are to be deemed to have notice of the said contracts, and to have agreed with the company (as trustee for the directors and other persons liable) to waive all claims, if any, against them for not more fully complying with the requirements of the said section, and allotments will only be made upon this express condition." The prospectus did not specify the dates of or the names of the parties to any of the contracts referred to in the last-mentioned paragraph.

The plaintiff, S. C. Watts, applied on the faith of the prospectus for twenty preference shares; they were allotted to him, and he paid 200*l.* for them. In January, 1902, he commenced this action, alleging that the shares had never had any value, and asking for compensation from the defendant. The plaintiff founded his action on the allegation that ten contracts by the promoters or their agents dated in 1895 and 1896 (of which he gave the dates and the names of the parties), material to persons who contemplated subscribing for shares in the company, had not been disclosed; that the prospectus to the knowledge of the defendant did not specify the dates of and the parties to these contracts; and that he (the plaintiff) had no knowledge of their existence.

The defendant was one of the directors, and took part in the

preparation of the prospectus. By his defence he denied that the contracts were material; that he knew of the contracts or any of them; that the prospectus to his knowledge omitted to specify the dates of or the parties to the contracts; that he was aware of the contracts; and that the plaintiff had no notice of the existence of the contracts. He relied on the waiver clause, and further contended that the contracts did not require to be specified under s. 38.

At the trial the plaintiff succeeded in proving six of these contracts, which were of such a nature as to shew that the value of the properties to be purchased by the company had been very much exaggerated.

Byrne J. gave judgment for the plaintiff for 200*l.* with interest.

The defendant appealed.

Levett, K.C., and *Bremner*, for the defendant. There are two questions—(1.) whether the defendant can be treated as having "knowingly" issued the prospectus merely because he might or ought to have known the nature of the contracts referred to; (2.) whether the "waiver" clause protects him.

(1.) The meaning of "knowingly" in s. 38 was explained by Cockburn C.J. in *Twycross* v. *Grant*. (1) A man cannot do a thing "knowingly" when in fact he does not know. The defendant's evidence shews that he knew nothing about the contracts, except what was stated in the prospectus, and that he was entirely ignorant of s. 38.

[ROMER L.J. He admitted that he had read the prospectus, and in that way he knew of the existence of contracts to which s. 38 would (though he did not know that) apply, and he did not take the trouble to make any inquiry.]

The defendant was an honest man, though he may have been ignorant. The fraud alleged is the creation of the statute, and the Court will hesitate to convict a man of fraud when he is in fact innocent. But for the waiver clause there is nothing to convict the defendant. The plaintiff is attempting to make the defendant liable by reason of constructive notice, not actual

(1) (1877) 2 C. P. D. 469, 541.

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notice. There was nothing tricky on the part of the defendant; he acted to the best of his knowledge.

[COZENS-HARDY L.J. referred to what he said in *Broome* v. *Speak*. (1)]

(2.) The waiver clause is sufficient to protect the defendant. The decision of Byrne J. in the present case goes further than any previous case: *Greenwood* v. *Leather Shod Wheel Co.* (2); *Cackett* v. *Keswick*. (3) It was not stated in this prospectus that there "may be contracts." It was stated that there were contracts, but that they "may be" within s. 38. The prospectus stated the existence of contracts, and having this information the plaintiff chose to subscribe for shares without making any inquiry.

But, if the statement made in the prospectus is sufficient to bring the defendant within s. 38, then it is submitted that the same statement must have operated to fix the plaintiff with notice of the contracts, so that he cannot take advantage of s. 38.

[ROMER L.J. Does not the "notice" mentioned in s. 38 mean notice of the contents of the contracts?]

The words are "notice of such contract," and s. 38 does not require more than the dates of and the names of the parties to any contracts to be stated.

In *Greenwood* v. *Leather Shod Wheel Co.* (2) there was a waiver clause, and yet some of the directors escaped on the ground that they did not know. It was not held that the waiver clause was sufficient to fix them with knowledge.

[COLLINS M.R. There was no cross-appeal in that case, and so the point did not arise in the Court of Appeal.]

Norton, K.C., and *Joseph Ricardo*, for the plaintiff, were not called upon.

COLLINS M.R. The action is brought by a shareholder against a director under s. 38 of the Companies Act, 1867, and the question is whether there was before the learned judge evidence which justified him in holding, as a matter of fact,

(1) Ante, pp. 586, 628. (2) [1900] 1 Ch. 421, 436.
(3) [1902] 2 Ch. 456.

that the conditions laid down in that section had been fulfilled. Now unless it appears to us that the learned judge has misconceived as a matter of law the true construction of that section, he obviously had a great advantage which we cannot have, inasmuch as he had the chief witness concerned before him, and not only heard but saw him in the box, and formed his own conclusion, as he was bound to do, as to what the state of that witness's mind was, and what the state of his knowledge was at the critical occasion in the case—namely, the meeting of directors at which the prospectus was brought forward for consideration and for signature. That meeting was called for that special purpose, and at it the prospectus was settled in the shape in which it was issued to the public. [His Lordship read the passage above quoted from the prospectus, and continued :—]

The defendant had himself been the owner of one of the breweries which had been acquired and were to be taken over by the company, and subscriptions were invited for the purpose of carrying out the adventure of working the breweries. He knew (and that is not denied) that the company had somehow acquired the breweries, and he knew that he had himself been the owner of one of them, and therefore it is fair to suppose that he must have known that the other must have been acquired by means of a contract or contracts. In addition to that, it is admitted that there were at least six other contracts dealing with the promotion and the formation of the company. One of them has been produced to us, and it is only fair to suppose that it is a sample of the others. It shews the amount at which the promoter had acquired one of the properties from the owner, and it also shews that he proposed to sell it at a large additional profit and to divide a portion of that profit with the vendor, calling it in distinct terms a promoter's profit. That is a sample of the six contracts which it is admitted were not disclosed—contracts which unquestionably ought to have been disclosed in the prospectus, and which would render a director who did not disclose them liable under s. 38, if he knew of their existence. Now, as I have pointed out, the defendant's own brewery was one of those which were about to be sold to

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the company, and those breweries must have passed to the person who sold them to the company by means of some contract. That was the state of the defendant's knowledge. Now, as I have said, he attended the meeting for the purpose of settling and signing the prospectus the terms of which I have read, and in it these contracts are not disclosed, neither those by which the breweries were acquired, nor the other contracts, the nature of which is admitted, shewing a very large amount of what is called "loading"—a sum to be received by the vendors to the company entirely disproportionate in comparison with that for which they had bought: a fact most material to be known to the subscribers.

Then the question is, Are the conditions of s. 38 fulfilled? Two answers are given on behalf of the defendant—(1.) that he did not in fact know of the existence of these contracts. Now no doubt the section makes it a condition of the defendant's liability that he shall "knowingly issue the same"—that is, the prospectus. It is said, "This man did not know, and therefore you cannot hit him at all." Now what is the evidence as to the condition of the defendant's mind? He must have known, quite apart from the prospectus, and indeed he admits that he knew, that somehow or other the right to sell these breweries to the public had been acquired by the company. Then comes the information given by the prospectus itself in the waiver clause, not qualified, but in the plain indicative mood: "During the negotiations for the purchase of the properties and the formation of the company, contracts have been entered into between various parties with reference to the formation and promotion of the company and the subscription of its capital." The uncontradicted evidence—the evidence of the defendant himself—is that he read the prospectus; he rather quarrelled with that suggestion at first, but ultimately in explicit terms he admitted that he read the prospectus. [His Lordship referred to the notes of the evidence, and continued:—]

The learned judge, having seen the witness and heard the different ways in which he answered the questions at different parts of his examination, came to the conclusion of fact that

he did know that contracts other than those disclosed on the prospectus, and relating to the formation of the company, existed. In my judgment there was abundant evidence to justify that conclusion; and if such a finding had been arrived at by a jury it would have been perfectly hopeless to question it. I do not say that we stand in exactly the same position as regards a finding of fact by the learned judge as we should in reference to a finding of fact by a jury. Still no one can judge of the evidence by the aid of a note, however accurate, precisely as well as the judge who hears the case. A learned judge of great experience has heard the defendant in a critical matter pledging his oath to his recollection of what took place, and, having watched carefully (as we see by the questions which he put) the whole mental process through which the witness was going, he has arrived at the conclusion that the defendant was in fact made aware that other contracts existed besides that which was disclosed in the prospectus. That the defendant was ignorant of the legal aspect of the case, and that he knew nothing whatever about s. 38 of the Act of 1867, I agree. But it is perfectly clear that ignorance of the law does not shelter a director or any other person included in the category mentioned in that section. If a man chooses to become a director of a company he incurs certain statutory obligations; he may be liable for a statutory fraud without any moral obliquity whatever. That is his misfortune. The Legislature deemed it right that this should be so, and though that section is now repealed it still governs the present case. It is therefore idle to say that the defendant was not dishonest. We are not imputing any dishonesty to him except the statutory fraud which is created by s. 38. He cannot shelter himself from that section under ignorance of the law, or even by saying that he invited the opinion of some one else as to the law and did not act for himself. The point has been decided in several recent cases, but it is enough for me to refer to one passage in the judgment of Cockburn C.J. in *Twycross* v. *Grant* (1), which is really the basis of the later decisions. Cockburn C.J. said (2): "Next, was the prospectus issued by the defendants

(1) 2 C. P. D. 469. (2) 2 C. P. D. 541.

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'knowingly,' within the meaning of the section? It was contended that the term 'knowingly' must be taken to mean with a knowledge that the contracts were such as the statute required to be referred to: consequently, that, the jury having found that the mention of the contracts was omitted from the prospectus from a bonâ fide belief that such mention was unnecessary, the contracts had not been 'knowingly' omitted. But this is to misconceive the meaning of the term. 'Knowingly issuing' means neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus. Ignorance or mistake of the law cannot be admitted as an excuse for disobeying an Act of Parliament." Therefore the defendant is in the unfortunate position of having known of the existence of these contracts, and that they were not stated in the prospectus, except in the manner which I have mentioned.

Then comes the point upon which so much stress has been laid on behalf of the defendant, namely, that while it has been held by the learned judge that the statement relating to these contracts contained in the waiver clause is not such as to affect an applicant for shares with notice of the contracts, yet it has been held that the same clause was sufficient to convey knowledge of the contract to the director himself. It is said that these two views are not consistent—that they are mutually destructive. If the applicant for shares did not have notice of the contracts the director could not have had notice either; and that is a complete answer to the plaintiff. In my opinion that argument cannot be maintained, for the position of a director is totally different from that of an applicant for shares. The director is placed by statute in a position which nothing short of a statute could have placed him. He is under an absolute obligation to disclose "the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus," and if he "knowingly issues" the prospectus without doing so he incurs a liability. Therefore, the conditions of his liability are fulfilled if he knows the dates and names of

the parties to the contract and does not state them. He is under an absolute statutory obligation to state them. But how does the case stand as regards the intending shareholder? He is under no statutory disability. The question is whether the existence of the contract and its nature have been set before him in such a manner that a reasonable man under no statutory obligation would understand them. If notice to that extent has been given to him, so that a reasonable man would understand that contracts did exist and the nature of them, then the person who did not in fact know of them must take the risk. But it will not suffice to say merely that the plaintiff had such constructive notice that he might have been put upon inquiry and might have searched the records, which are not very easily accessible, and thus have arrived at a conclusion. We must measure the terms of the prospectus and see how far they fairly apprise the reader of the existence and effect of the contracts, having regard to the different standard which must be applied to a would-be purchaser from that which regulates the duty of a director. The clause which is relied upon as a sufficient notice to an applicant for shares is this: "The contracts referred to in this paragraph are, or may be, contracts within the meaning of the 38th section of the Companies Act, 1867; and, accordingly, applicants for shares are to be deemed to have notice of the said contracts." That puts the matter forward in such a tentative way that an intending applicant for shares may be led to suppose that those persons who are best acquainted with the matter are so doubtful whether these contracts have anything more than a bare technical relation to the matters dealt with by s. 38 that they do not think it worth while or desirable to disclose them in the prospectus. Any one reading the prospectus might well believe that its authors were bonâ fide stating their view that the possible relation of the contracts was so slight and technical that it was not worth while to disclose them. It is not a frank and fair avowal of the true nature of the contracts so as to apprise an intending shareholder of what he was invited to undertake. That this is the law on the point is, I think, clear from decided cases. I will quote the judgment of my brother Stirling L.J.

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in *Cackett* v. *Keswick* (1), which happens to be one of the latest decisions, though it does not stand alone. Stirling L.J. said (2): "When persons who issue a prospectus make statements in that prospectus with reference to the contracts, in respect of which the benefit of the statute is to be excluded, they must be such as to be in all respects well founded in fact, and fairly to convey to the mind of the intending shareholder the nature of the contracts which have been excluded." And in the same case in the Court below Farwell J. said (3): "As I read the judgments in *Greenwood* v. *Leather Shod Wheel Co.* (4), the decision, and the reasons given for it, involve the proposition that the statutory rights under the 38th section can be waived; that any waiver obtained by unfair dealing or trickery is void; that the person said to have waived must have sufficient information of what he was waiving; and that, apart from fraud, the same principles apply to waiver clauses as are applicable to ambiguous or misleading statements in conditions of sale or releases." Therefore there is no logical fallacy whatever in saying that an intending purchaser of shares is not affected with the notice with which a director is affected. In the one case the bare knowledge of the fact is enough; in the other case there must be something more—there must be a fair explanation by the persons who do know to the persons who do not know the nature of the contracts which are not disclosed.

For these reasons the learned judge was, in my opinion, perfectly right in his conclusion. Indeed, he has himself given a very clear and short statement of the law as regards a waiver clause. He said (5): "The other point is as to the effect of the waiver clause in the prospectus; and it is now clearly established that a man may waive or release his statutory right to have the date and names of parties to material contracts set out in a prospectus. Every device to avoid giving to intending shareholders that information which the law says they should have is from time to time resorted to. My view is that it is a true statement of the law to say that no protection can be

(1) [1902] 2 Ch. 456.
(2) Ibid. 477.
(3) [1902] 2 Ch. 468.
(4) [1900] 1 Ch. 421.
(5) [1902] 2 Ch. 634.

afforded to those responsible for the issue of a prospectus, under a waiver clause which they invite subscribers to submit themselves to, unless they fairly disclose what is the nature of the rights which they ask should be released or waived. Large print, little print, italics, red ink, and other attractive devices in other parts of the prospectus to lead the unwary away from the true path of inquiry are only specimens of the art of deceiving, and an apparent candour may be a most potent engine of deception." I have I hope sufficiently distinguished between the case of a director and that of a would-be shareholder. The case really resolves itself into a question of fact. In my opinion the learned judge was right, and the appeal must be dismissed.

ROMER L.J. I agree that the appeal must be dismissed. The defendant when he issued this prospectus knew that there were in existence contracts between various parties "with reference to the formation and promotion of the company and the subscription of its capital." He also knew that those contracts were, or might be, contracts within the meaning of s. 38 of the Companies Act, 1867. He had actual—not merely constructive—knowledge of the existence of those contracts. They were in fact contracts which were most material to be set forth for the guidance of intending subscribers who were relying upon the prospectus. Can the defendant—a director issuing this prospectus—be heard to say that he did not know of the existence of contracts, the dates of which and the names of the parties to which ought to have been specified under the provisions of s. 38, merely because he, knowing of their existence, did not choose to look into them and ascertain the exact contents of each document? In my opinion, clearly not. Under the circumstances he, in my opinion, "knowingly" issued within the meaning of s. 38 a prospectus which did not specify the dates and the names of the parties to contracts which came within the provisions of the section.

Then arises the second question: Had the plaintiff, who subscribed for shares on the faith of this prospectus, "notice" of those contracts? Now in my view the notice of the contracts

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which is to be given to or possessed by an intending subscriber within the meaning of s. 38 must be a notice, not only of the existence of the contracts, but also of their contents as bearing upon the statements in the prospectus. Such a notice as that the plaintiff clearly had not. It follows that, in my opinion, the defendant falls under the liability imposed by s. 38, and that the plaintiff must succeed in the action, unless the defendant can avail himself of the "waiver" clause. In my opinion he cannot do that. To my mind the statement in that clause that "the contracts referred to in this paragraph are, or may be, contracts within the meaning of the 38th section of the Companies Act, 1867," clearly refers to all contracts of the nature previously mentioned in the same paragraph. What does it amount to? In my opinion, in a prospectus of this kind, it amounts to a representation by those who issue it that they, who know of the existence of these contracts and what they contain, are so doubtful whether they are in anywise material for the purpose of this prospectus that they do not even know whether they come within the provisions of s. 38. That to my mind is the representation made, and under the circumstances it is clearly misleading and tricky as regards this defendant. So far from his being able in good faith to make such a representation as was in substance made by this prospectus, his only excuse is that he did not take the trouble to investigate these contracts at all, or to see whether they were or were not material, and ought to have been set forth in the interests and for the information of intending subscribers. It appears to me, therefore, that the defendant cannot rely upon the waiver clause, and, that being so, there is no other defence open to him, and accordingly he has in my opinion been rightly made liable at the suit of the plaintiff.

COZENS-HARDY L.J. I agree, and I have very little to add. On looking at the prospectus it is apparent that the company was formed to purchase two distinct breweries and to amalgamate them. The company was also formed to acquire certain maltings and other houses not forming part of either of the breweries. Of the breweries one bore the name of Bucknall's Brewery,

and had at some time before the issue of the prospectus been the defendant's own property. He had sold it for between 40,000*l.* and 50,000*l.* This company was formed, as the prospectus states, to amalgamate the breweries as going concerns, and to pay 440,000*l.* for the whole. The prospectus stated, and the defendant must certainly have known, that the vendors who promoted the company had acquired these properties to resell at a profit. The prospectus stated one contract of purchase and one only, namely, the contract of December 1, 1896, and that contract was for the purchase of the aggregate for 440,000*l.* Pausing there, it seems to me impossible to doubt that the defendant must have known that contracts had been entered into by the promoters with the owners of the several properties—contracts altogether different from the single contract for the sale of all the properties by the promoters to the company for the aggregate sum of 440,000*l.* Not one of those contracts of purchase entered into by the promoters prior to December 1, 1896, was disclosed in the prospectus. Moreover, there had been other contracts entered into with reference to the formation and promotion of the company and the subscription of its capital, and I am not at all clear that that paragraph in the prospectus really covers the preliminary contracts by the promoters for purchase of the several properties, or whether, according to its true construction, it ought not to be limited to contracts with reference to the formation and promotion of the company as distinguished from contracts for the purchase by the promoters of the properties which they proposed to sell to the company at an enormous profit. At all events, I think we are entitled to read this clause very carefully and rather stringently as against those who put it in the prospectus. How does the matter stand? It seems to me that, quite apart from the waiver clause, the defendant must have known of the contracts for sale to the promoters, whether he did or did not know of the underwriting contracts and promoting contracts, and there is, I think, no fair statement that they are contracts which are intended to be excluded by the waiver clause. If, however, I am wrong and those contracts do fall within the waiver clause, then, for the reasons which have been

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stated by the Master of the Rolls and Romer L.J., it seems to me impossible for the defendant to rely upon that clause. I desire to adopt entirely the language used by Farwell J. and Romer and Stirling L.JJ. in *Cackett* v. *Keswick* (1), and I doubt whether a waiver clause of this nature ought ever to be allowed to operate, except upon such conditions as would enable the defendant to rely upon a release in general terms. I do not desire to repeat what has been said by the Master of the Rolls as to the different bearing and effect of statements in a waiver clause upon the director who issues the prospectus, and upon the applicant for shares on the faith of it. I entirely adopt what the Master of the Rolls has said. But, apart from that, I think there is in this case ample evidence to justify the finding of the learned judge that the defendant did in fact know that there were contracts which would come within s. 38. It is not material whether he knew that they were within s. 38; but he knew of the existence of contracts which, according to law, came within s. 38, and he is in no way protected by the waiver clause.

Solicitors: *Ashurst, Morris, Crisp & Co., for W. H. Talbot, Kidderminster; Joseph Davis.*

(1) [1902] 2 Ch. 456.

W. L. C.

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SAVILE *v.* DRAX.

[1902 D. 30.]

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Lien—Equitable Charge on Land—Interest not mentioned in Charge—Enforcing Charge—Lapse of Time—Presumption of Satisfaction—Merger—Allowing Interest on Charge on Land—Practice—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 40.

Where any settlement or contract contains a provision that a certain fixed sum of money is to be charged on land and to be paid at a fixed time, then, as between the owner of the land and the person entitled to the money, the money, in the eye of a Court of Equity, bears interest from the date fixed for payment of the money, although nothing is said as to interest in the settlement or contract—unless there are circumstances negativing the presumption that interest is payable.

In 1823 an order was made in a lunacy giving the lunatic's committees power to purchase on his behalf a freehold estate, and to pay the purchase-money out of the rents and profits of his real estate; and the order went on to declare that the rents and profits so to be applied "shall form a lien on the purchased estate in trust for the lunatic, his executors and administrators"; but the order was silent as to interest. The committees accordingly paid the purchase-money out of the rents and profits of the lunatic's real estate, and in 1824, in consideration of the purchase-money, a conveyance was executed to trustees for the lunatic. The conveyance contained a declaration of lien corresponding to the terms of the order, but again without mentioning interest.

In 1828 the lunatic died intestate, leaving a married sister his heiress-at-law and sole next of kin, who thereupon took out administration to his estate. In 1853 she died, when her husband, D., became tenant by the curtesy of the purchased property, and continued in enjoyment as such until his death in 1887. After his wife's death he had taken out administration to her estate, and also to the estate of the lunatic. No steps had ever been taken for raising the amount of the lien or charge, and no interest had ever been paid upon it.

In an action by D.'s legal personal representatives against the persons who had become entitled to the purchased estate to enforce the lien:—

Held, (1.) that there had been no merger of the lien either at law or in equity, and nothing to justify a presumption of satisfaction through lapse of time; and (2.) that, although interest was not mentioned either in the order in Lunacy or in the conveyance, the Court would, in accordance with its well-settled practice in other cases of equitable charges on land where interest is not mentioned (such as loans on deposit of title-deeds, portions and legacies charged on land), and having regard to the circumstances of the case, treat the lien as an interest-bearing debt—that

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is to say, as bearing interest at 4 per cent. as from the death of the lunatic; and that inasmuch as, in the events which had happened, such interest must be regarded as having been virtually paid down to D.'s death in 1887, the lien was not statute-barred at that date. As by arrangement between the parties the statute was treated as not running from D.'s death, interest was allowed as from that date.

Decision of Joyce J. affirmed.

IN the year 1814 Richard Drax Grosvenor contracted to purchase from the trustees of a will, which was the subject of an administration action, a freehold estate called "Hobbys" in the county of Dorset for 1577*l.* 12*s.*, on which he paid into court a deposit of 150*l.*; but in February, 1819, he died intestate without having paid any further part of the purchase-money, or having otherwise completed his purchase. Richard Drax, his only son and heir-at-law, was, in 1822, found a lunatic by inquisition, and committees were appointed of his person and estate. By an order of April 9, 1823, made in the lunacy, liberty was given to the committees of the lunatic's estate on his behalf to complete the purchase of "Hobbys," and to pay the remainder of the purchase-money out of the rents and profits of his estate, and it was referred to the master to settle and approve of a proper conveyance of the purchased estate, and to appoint two fit and proper persons to whom the conveyance should be made in trust for the lunatic; and it was also declared "that the rents and profits of the real estate to be applied in making good the said purchase-money shall form a lien on the said purchased estate in trust for the said lunatic, his executors and administrators." Nothing was said in the order as to interest on the lien.

In pursuance of that order, and of an order made in the administration action, the committees, out of the rents and profits of the lunatic's real estate, duly paid into court in the action the sum of 1627*l.* 10*s.*, being the balance of purchase-money and interest.

By a conveyance of April 28, 1824, approved by the master, and to which the committees of the lunatic and also trustees appointed on his behalf were parties, in pursuance of the said orders in Lunacy and in the administration action and in consideration of the deposit of 150*l.* already paid into court, and of

the further sum of 1627*l.* 10*s.* also paid into court, Hobbys was duly conveyed unto and to the use of the trustees for the lunatic, their heirs and assigns. And the indenture concluded as follows: "Provided always and it is hereby declared that the sum of 1627*l.* 10*s.* so paid by the said committees of the said Richard Drax shall be a lien upon the said Hobbys hereby granted and released or expressed and intended so to be, in trust for the said R. Drax, his executors or administrators." Nothing was said in the deed as to interest on the lien.

On August 18, 1828, Richard Drax, the lunatic, died a bachelor and intestate, leaving his sister Jane Drax, the wife of John Drax, his heiress-at-law and sole next of kin. On her marriage, which had taken place in the lunatic's lifetime, there was no settlement or agreement for settlement affecting Hobbys or the 1627*l.* 10*s.* charged thereon. On September 19, 1828, she took out administration to the lunatic's estate, which was amply sufficient for payment of his debts. On December 29, 1853, she died leaving her husband surviving her and two daughters, Maria Drax and Sarah Drax, her co-heiresses-at-law. She left a will, but it was inoperative as regarded any real and personal estate not belonging to her for her separate use. On April 20, 1854, administration to her estate with her will annexed was granted to her husband, John Drax, who, on May 24, 1882, took out administration de bonis non to the lunatic's estate also. Upon his wife's death John Drax became tenant by the curtesy of Hobbys, and as such continued in the enjoyment of the property during his life.

Maria Drax died on August 18, 1885, having made a will, whereby she gave her residuary real and personal estate, which did not include her moiety of Hobbys, to her father the said John Drax absolutely; and on October 30, 1886, administration with her will annexed was granted to him.

On January 5, 1887, John Drax died, leaving a will dated August, 1885, of which the plaintiffs were the surviving executors and trustees. His surviving daughter, Sarah Drax, was still living, and was the wife of John Lloyd Drax. She had at present one child only, a daughter, the Baroness Dunsany, widow.

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On January 11, 1902, administration to the estate of Maria Drax with her will annexed was granted to the plaintiffs, who thus became her legal personal representatives.

No part of the 1627*l.* 10*s.* had ever been raised, nor had any interest on it ever been demanded or paid.

On January 4, 1902, an originating summons was taken out by the plaintiffs, the surviving executors and trustees of the will of John Drax, against the defendants, Sarah Drax and her husband, and their daughter, the Baroness Dunsany, for (amongst other purposes) a declaration that the plaintiffs were entitled to a lien on Hobbys for 1627*l.* 10*s.* and interest thereon as from January 5, 1887, being the date of the death of the said John Drax, and to have such lien enforced by foreclosure or sale.

On the part of the defendants it was contended that the 1627*l.* 10*s.* was not, at the death of Jane Drax (the wife of John Drax) on December 29, 1853, or at any time after that date, and was not now, either in whole or in part, a subsisting charge on Hobbys, the charge (if any) created by the deed of April 28, 1824, having been, prior to that date, barred by the Statutes of Limitation.

By arrangement between the parties the statute was treated as not running from and after January 5, 1887.

The summons was heard by Joyce J. on June 4 and 5, 1902.

G. I. F. C.

Hughes, K.C., and *J. Davenport*, for the plaintiffs. The question is whether the lien, which undoubtedly existed, is now subsisting, or whether it has become merged in the land. We submit there has been no merger.

Badcock, K.C., and *J. F. Popham*, for the defendants. First, we contend that the charge merged in the land some time before the death of Mrs. John Drax in 1853. Secondly, if no merger took place, then the right to the lien is extinguished by the operation of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27, s. 40); Shelford's Real Property Statutes, 9th ed. p. 176. From 1828 to 1853 Mrs. Drax, as administratrix, failed to bring any action to have the charge raised, and the right to

the lien is now barred by the statute, unless it can be shewn that any interest was paid. We submit that none was payable: *Page* v. *Newman.* (1) *Carey* v. *Doyne* (2), which was followed in *In re Kerr's Policy* (3), was a case of an equitable mortgage. Here there is simply a declaration of lien, and neither the deed nor the order say anything about interest. No doubt where the same hand is to pay and receive interest the statute does not run, but here no interest was payable.

Hughes, K.C., in reply. The land and the charge were never at any time held by one person in the same right.

Merger is always a question of intention in equity: Lewin on Trusts, 10th ed. p. 889; *Ingle* v. *Vaughan Jenkins.* (4) Where the interest in the land is absolute the presumption is in favour of merger; but where the interest is limited the presumption is the other way; and even in the former case the presumption may be rebutted by a manifest intention to keep the charge alive: Williams on Executors, 9th ed. p. 603: *Burrell* v. *Earl of Egremont.* (5) If there was no merger in this case before 1853, there could be none after that date.

Upon the question of merger, it must be considered whether the land and the charge are held in the same right, as distinguished from the mere right to receive the rents. For the purpose of the Statute of Limitations it is only necessary to consider whether the person entitled to the receipt of the rents is the same as the person entitled to the interest. The question of merger and the question of the statute, therefore, depend upon different considerations.

For merger to arise there must be some person entitled to the land and the charge in the same interest, and with the same incidents of estate. Here the relative interests of the husband and wife were quite different as between the land and the charge.

As to the payment of interest, we rely on *In re Kerr's Policy.* (3)

(1) (1829) 9 B. & C. 378; 33 R. R. 204.
(2) (1856) 5 Ir. Ch. Rep. 104.
(3) (1869) L. R. 8 Eq. 321.
(4) [1900] 2 Ch. 368.
(5) (1844) 7 Beav. 205.

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JOYCE J., after reading the order in Lunacy directing the lien, and also reading the conveyance including the declaration as to lien, continued:—Now, looking at the object of this deed and the order in Lunacy and what all the parties had in view, I am of opinion that a lien was constituted in favour of the persons who were entitled to the personal estate of the lunatic as against those who were entitled to the real estate upon his death. I think also, if it be material (and I do not know that it is), that interest, from the very nature of the transaction, must have been payable in respect of this lien as from the death of the lunatic. It would be quite contrary to the intention of everybody concerned that there should be a merger of the lien during the remainder of the life of the lunatic, and I am not quite certain that on that document itself the estate is not in trustees, but the lien was in the lunatic, in which case it would not be in the same person. I do not care whether that is so or not, because, looking at what must have been the object and intention of this transaction and this arrangement, which would have been utterly frustrated if there had been a merger during the life of the lunatic, I am of opinion that there was no merger during the life of the lunatic, and I think the interest would run as from the date of the death of the lunatic. He died on August 18, 1828, intestate, and upon his death his sister, Jane Drax, became entitled as his heiress-at-law to his real estate. She was also his next of kin, and she took out administration to the personal estate of the lunatic. She was the wife of John Drax, and she was a married woman at the time of the death of the lunatic, whose heiress-at-law and sole next of kin she was.

Now it is obvious that if this charge remained vested in her as administratrix during the whole of her life (she died in December, 1853) there could be no merger during that time; but as the personal estate other than this charge was amply sufficient to discharge all the liabilities of the intestate, I am of opinion that we must really treat this case in the same way as if this lady, although she took out administration, became beneficially entitled to this charge upon the death of the lunatic as well as being also entitled to the real estate. Now

we know perfectly well what the law is. It is stated thus at p. 526 of Sweet's Law Dictionary: "In equity, where a legal and an equitable estate, equal and coextensive, unite in the same person, the latter merges in the former. Where an estate of inheritance in land and the right to a charge upon it become vested in the same person absolutely (as where a person entitled to have a portion raised out of land becomes entitled to the land in fee simple), the charge will merge unless kept alive, or unless it is to the owner's interest that it should not merge. There is a general leaning against merger in Courts of Equity, except in those cases where merger is convenient and beneficial to all parties." Then further on it is stated that it has been held in the case of an infant, for example, where the real estate and the charge came to an infant, the charge did not merge because the infant (I am speaking of the old law as it existed when this transaction took place) had power to dispose of the personal estate before attaining twenty-one, but had no power to dispose of the realty: see also Watson's Compendium of Equity, 2nd ed. p. 682.

Considering the different rights and powers of this lady and her husband with respect to the charge and with respect to the land, I am of opinion that there was no merger of this charge in the land during the coverture—that is to say, between 1828 and 1853. At the commencement of that period the Statute of Limitations which is now in force was not in existence. That is the Act of 3 & 4 Will. 4, c. 27, and it was not until after 1833 or 1834 that it came into operation; but it is quite clear to me that, even if the statute had been in force during the whole of the coverture of Mr. and Mrs. Drax, the time would not have run for the reasons given in those cases which are to be found cited at p. 743 of Fisher on Mortgages, 5th ed., and in the note on p. 180 of Shelford's Real Property Statutes, 9th ed., namely, "Where the rent out of which the interest of the charge ought to be paid is receivable by, and belongs to, the same person who is entitled to the interest; as where a tenant for life paid off a charge affecting the settled estates," the statute does not run. Here the husband was entitled to receive the rental of the land, and he was

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also the person who could have given a receipt for and was entitled to receive the interest on the charge.

Now, if I am right as to the period from 1828 to 1853, there is less difficulty in the subsequent period, namely, from the death of Mrs. Jane Drax in 1853 until 1887. From that time down to 1887 her husband John Drax was tenant by the curtesy of these lands. Of course the interest and the charge on the land were totally different, and there was no merger during that period and the statute was not running. It has been agreed between the parties that this question should be dealt with as the matter stood in 1887. Therefore, in my opinion, this charge is still alive.

[His Lordship then made an order upon the summons containing a declaration that the plaintiffs, as the legal personal representatives of John Drax, were entitled to a lien or charge on Hobbys for the 1627*l.* 10*s.*, with interest thereon at 4 per cent. per annum from January 5, 1887, the date of his death.]

G. A. S.

C. A.

The defendants appealed, and asked by their notice of appeal a declaration that, in the events which had happened, the plaintiffs were not entitled to a lien or charge for the 1627*l.* 10*s.*, or for any interest thereon; but, if the Court should be of opinion that the plaintiffs were entitled to a lien or charge for the principal sum, then that the plaintiffs were not entitled to any lien or charge for interest thereon.

The appeal was heard on March 19, 1903.

Badcock, K.C., *Vaughan Hawkins*, and *J. F. Popham*, for the defendants. First, we submit that, upon the lunatic's death in 1828, the charge of 1627*l.* 10*s.* became merged in the inheritance, since the right to receive and the obligation to pay the sum charged became united in the same person, his sister, who was both his heiress-at-law and sole next of kin.

But if we are wrong on the question of merger, then we submit, secondly, that the plaintiffs' claim to the 1627*l.* 10*s.* is barred by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 40 (Shelford's Real Property Statutes, 10th ed., sub

nom. Carson's Real Property Statutes, p. 190), because the sum did not carry interest, for neither the order in Lunacy of April 9, 1823, nor the deed of April 28, 1824, said anything about interest, and there is no sufficient reason why the order or the deed should be read as giving interest. In fact, no interest was ever paid or demanded at all, for there was no intention of keeping the charge alive after the death of the lunatic, when both the charge and the land became vested in the same person. The facts themselves shew that there was no such intention, for upon the sister's death in 1853 nothing was said about raising the 1627*l.* 10*s.*, and indeed it appears that the sum was not included in the details of her estate. Again, in 1882, when her husband took out administration de bonis non to the lunatic's estate, nothing was said about raising the sum. So that no steps were ever taken by any person for keeping the charge alive. Why then should it be treated as carrying interest? It will probably be said that every equitable charge on land carries interest, though not mentioned in the instrument creating the charge. No doubt there are some kinds of lien that do carry interest, such as the lien of a banker or broker, but that is under the law of merchants. So a maritime lien carries interest, but that depends partly on custom and partly on statute. So in the case of a trust fund recovered, but that is because equity, in following the trust fund, gives a complete indemnity to the person injured. Again, a solicitor's right to interest on his lien on his client's title-deeds arises partly from custom and partly from statute. And a vendor's lien for interest on unpaid purchase-money arises from the nature of the contract. But there is nothing in the circumstance of a charge being on land to give a right to interest, in the absence of contract. Under s. 28 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), the Court has power to give interest on all debts or sums certain, but those do not include sums charged on land. For instance, the Court of Chancery, in relieving against the penalty under a bond, gave the obligee interest in lieu of the penalty.

[ROMER L.J. I am under the impression that an equitable charge on land always carries interest.]

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It may be said that the dictum of Bacon V.-C. in *Lippard* v. *Ricketts* (1)—that "when the Court has once decided that there is a charge, the sum charged must bear interest"—is an authority for that; but we submit that the Vice-Chancellor is wrong. In the case he refers to as supporting that view—*In re Kerr's Policy* (2)—the debt was a simple contract debt secured by a deposit of deeds, which was, in effect, an agreement to execute a mortgage, and every mortgage carries interest as part of the mortgage transaction.

[COZENS-HARDY L.J. In *Eardley* v. *Knight* (3) Kay J. held that to entitle a man to interest on costs he must shew that the costs are "charged on the estate." He declined to extend the decision in *Lippard* v. *Ricketts*. (4)]

Lippard v. *Ricketts* (4) was a case of mortgage—adding to the existing security. In *Thompson* v. *Drew* (5) it was held that a mortgage which was silent as to interest carried no interest.

[COZENS-HARDY L.J. In that case there was, in effect, an express contract not to pay interest.]

There is no presumption that a charge on land should bear interest any more than a charge on anything else. Here the sum was not money raisable at a certain time: it was only to be raised if wanted, and it never was wanted. A simple contract debt no doubt carries interest without any express provision: *In re Horner* (6); *Carey* v. *Doyne* (7); but in *Ashton* v. *Dalton* (8), cited in the latter case, it was doubted whether a debt secured by deposit of deeds could bear interest. In the absence of any contract to pay interest, interest is only given where there has been neglect or default—that is, by way of damages: *Webster* v. *British Empire Mutual Life Assurance Co.* (9) Here it is no fault of the defendants that the money has not been raised.

[COZENS-HARDY L.J. In the case you have just cited the action was really a common law action on the policy.

(1) (1872) L. R. 14 Eq. 291, 294.
(2) L. R. 8 Eq. 331.
(3) (1889) 41 Ch. D. 537.
(4) L. R. 14 Eq. 291.
(5) (1855) 20 Beav. 49.
(6) [1896] 2 Ch. 188.
(7) 5 Ir. Ch. Rep. 104.
(8) (1846) 2 Coll. 565.
(9) (1880) 15 Ch. D. 169, 173, 174.

ROMER L.J. Take the case of a portion charged on land. That undoubtedly carries interest without any express provision. The reason has been stated to be that the portion is to arise out of land, which yields yearly rents and profits: *Trafford* v. *Ashton*. (1) Interest is given where a sum charged on land is raisable at a time certain. That seems to be the principle.

Hughes, K.C. Lewis v. *Freke* (2) is an authority for that.]

That was a case in which it was held that a man having a power to charge portions could charge interest also: the question was one of the construction of the power. It has been held that all legacies, without distinction, whether charged on land or not, carry interest: *Pearson* v. *Pearson*. (3) It would seem, therefore, that the reason why a legacy charged on land carries interest cannot be because the land yields rents and profits, and so it is stated in that case. There are two principles upon which a Court of Common Law gives interest on a debt: (1.) when the intent of the parties that interest should be paid is to be collected from the terms or the nature of the contract; and (2.) where the debt has been wrongfully detained from the creditor, in which case interest is given as damages: *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (4) Those principles should apply equally in a Court of Equity. In the present case, the question whether, in equity, this lien or charge should carry interest or not depends, not upon any supposed rule of practice, but upon what the Court chooses to do having regard to the benefit of the lunatic's estate: *Attorney-General* v. *Marquis of Ailesbury*. (5) The Court in Lunacy, when they made the order for a charge, must have had some good reason for omitting any mention of interest. The true explanation seems to be that it was never intended to set this up as a continuing charge, like a mortgage on a family estate, but to keep matters in statu quo until the lunatic's death, when the sum could be raised if wanted. Now, treating this

(1) (1718) 1 P. Wms. 415, 419.
(2) (1794) 2 Ves. Jr. 507; 2 R. R. 301.
(3) (1802) 1 Sch. & Lef. 10; 9 R. R. 1.
(4) [1892] 1 Ch. 120, 142, 143, 153.
(5) (1887) 12 App. Cas. 672.

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case as if it was being decided in 1887, when the husband of the lunatic's sister died, we have the important fact that nothing was done with regard to the charge at the death of the lunatic, and no notice taken of it for fifty-nine years. In such circumstances the Court will lean to the presumption that the charge is altogether extinguished.

Hughes, K.C., Theobald, K.C., and *L. F. Potts*, for the plaintiffs, were not called upon.

COLLINS M.R. stated the facts, and said that there was no question whatever but that a charge was, with the sanction of the Court, created on the land comprised in the conveyance of April 28, 1824, and that, on the lunatic's death, the sum charged ought to have been raised and paid. His Lordship then continued:—Two points have been taken by the counsel for the appellants. In the first place, it is said that the right to the money as personal property and the right to the land became merged in the same person, and that, therefore, the lien is gone. Now the lunatic died leaving his sister his heiress-at-law and sole next of kin. But the sister was married, and therefore the right with regard to the 1627*l.* 10*s.*, which was the wife's chose in action, and the right with regard to the land, never coalesced in the same person: consequently there could be no merger either at law or in equity. Afterwards the sister died leaving a husband, who then became tenant by the curtesy of the land, and he was in the enjoyment of it until his death in 1887. Clearly there was no merger up to that date. Then counsel, having failed upon the point that there had been a merger, fall back on the Statutes of Limitation and say that, as no interest was ever paid upon this charge, there was no intention and no obligation to keep the principal sum alive. If interest was payable, of course counsel are met by the difficulty that up to 1887 the obligation to pay and the right to receive were united in the same person, and therefore the statute was not running up to that year, while it has been agreed between the parties that the lapse of time since 1887 is not to be taken into account. Therefore, we come to this point—whether, as the result of the charge,

interest was or was not payable; and this appears to me to be the only point in the case. It seems to me to be well established on the authorities, and the result of those authorities does not indeed appear to be disputed, that a Court of Equity has power to give interest, and in point of fact does so where a charge is created on land, although there are no words allowing interest in the instrument creating the charge. Indeed, we go back to the principle laid down in many cases shewing that, in point of fact, the Court of Equity does charge interest. Many cases to that effect have been cited in the course of the argument, but it is not necessary to go through them: it is, in fact, admitted that the Court has power to charge interest. But counsel for the appellants say that, although the Court has power to charge interest, yet the circumstances of the particular case may lead it to consider that it ought not to order or enforce payment of interest. But in the present case it appears to me—and the learned judge has so held—that the circumstances, instead of rebutting the presumption that interest was payable, assist it, because the charge was made in order to safeguard the right of the persons entitled to the lunatic's personal estate as against the right of the persons entitled to the land, and to adjust those rights between them. What was the object of it but to give to those representing the personal estate, as against those representing the land, the right to have the charge paid? Therefore, it seems to me that this is just the case in which interest should be paid. In my opinion it is peculiarly a case in which the Court ought to follow its well-settled practice. Accordingly there must be a declaration that interest is payable on the charge. The appeal fails and must be dismissed, with costs.

ROMER L.J. I am of the same opinion. With regard to the property purchased, and which was conveyed by the deed of April 28, 1824, in my opinion there can be no question but that what was paid into court as purchase-money was so paid in to save the rights of those persons who should be interested in the personal estate of the lunatic at his death as against those who should be interested in his real estate, in case

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they should be different persons. That seems clear from the words of the declaration of the lien in the conveyance. The object and intention, to my mind, are clear, that, if the persons entitled to the real estate at the death were not the same as the persons entitled to the personal estate, then the former were to recoup to the latter the money spent in acquiring the land. Accordingly, in the deed of 1824 we find a declaration that on the death of the lunatic a fixed sum should be recouped from the realty to the personalty in the events which happened.

Now I take it to be settled at the present day that, if you find in any settlement or contract a provision that a sum of money is to be charged on land and the money is to be paid at a fixed time, the sum itself being fixed, then, as between the owner of the land and the person entitled to the money, although nothing is said in the settlement or contract as to interest, in the eye of a Court of Equity, from the date fixed for payment of the money, that money bears interest. There might be, no doubt, circumstances so strong as to negative the presumption that interest was payable—there are none such here; but certainly this is the rule—and it is illustrated by loans upon the security of a memorandum of deposit of title-deeds of land. There the money so charged bears interest whether there is an express provision for payment of interest or not. So in the case of portions raisable out of land at a fixed time, and to a fixed amount: they certainly bear interest. So also legacies charged on land, which stand on a different footing from legacies not so charged, carry interest from the death.

Now, the circumstances of the present case, so far from this case being such as to induce the Court to treat it as an exception to the rule, shew strongly that the rule ought to be applied, because the object of what was done in this case was to allow the rights to the real and the personal estate of the lunatic to be adjusted at his death, and therefore the case clearly falls within the general rule that in equity interest is payable from the death. The facts of this case shew that there has been no merger either at law or in equity, and that

there is no bar to the claim by reason of the Statute of Limitations.

It was said that, owing to the lapse of time, there must be a presumption of satisfaction of the charge; but I am convinced that this cannot be so. There is nothing shewing any intention on the part of any of the parties interested that the charge should be treated as raised or satisfied; and I am fortified in that view by the case of *In re Dixon*. (1) It appears to me that in a case like this, where you cannot establish from the Statute of Limitations that a claim to have money paid out of real estate is barred, you ought not to raise the presumption of satisfaction by the application of any general rule. If the Statute does not apply at all, you cannot fall back on any general rule. In my opinion the circumstances here are not such as to justify the Court in holding that the amount secured can be presumed to have been discharged by lapse of time. It was admitted before us that this case is to be decided as if it had arisen for decision in 1887.

COZENS-HARDY L.J. I am of the same opinion. As I understand the judgment of the learned judge below, he thought there was a legal merger, but no merger in equity; but it appears to me that there is not any moment of time at which it can truly be said that there was any merger either at law or in equity.

A more difficult question arises under the Statute of Limitations, and that arises on the answer to be given to the question whether the sum ordered by the Court in Lunacy to be charged on the land purchased, for the purpose of recouping the lunatic's personal estate, did or did not carry interest from the death of the lunatic, which happened in 1828, having regard to the fact that until 1887 the hand to pay and the hand to receive the interest (if payable) was the same.

It is perfectly well settled that where you have an equitable charge on land to secure the payment of a debt, it carries interest, although there is no mention of interest in the instrument of charge. That is established by *Ex parte Hirtzel* (2)

(1) [1900] 2 Ch. 561. (2) (1858) 3 De G. & J. 464.

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and by *In re Kerr's Policy* (1), where James V.-C. said, in giving judgment, "I think that a deposit of title-deeds to secure a loan is to be considered as an agreement to execute a mortgage of the property comprised in the deeds, with interest."

It is equally well settled in the case of a portion that, although no mention is made of interest, yet it is a charge which carries interest, and interest at the rate current in the country in which the land charged is situate. For that *Balfour* v. *Cooper* (2) is a clear authority. There are many other cases of equitable lien or charge in which the Court has given interest, though not mentioned. I am not aware of any case in which the Court of Chancery has refused to give interest on an equitable lien or charge, and I think the view taken by Bacon V.-C. in *Lippard* v. *Ricketts* (3) is the correct one. There he says: "In the case of *In re Kerr's Policy* (1) the Court seems to have proceeded on the theory that a debt secured by equitable mortgage will, unless something is said or may be implied to the contrary, carry interest; and it seems to follow that, when the Court has once decided that there is a charge, the sum charged must bear interest." *Lippard* v. *Ricketts* (3) was a case in which a person had a charge, not by a mortgage deed bearing interest, but by an order of the Court which said nothing about interest. The case was one in which it would have been very easy to hold that interest was payable, if it had been one of an ordinary mortgage carrying interest, but it was not: it was a case in which a person had obtained an order giving him a charge upon certain real and personal estate comprised in an annuity deed. Bacon V.-C. held that, inasmuch as a charge had been created by the order, that charge must bear interest. Whether the Vice-Chancellor's statement of the law is exhaustive it is not necessary now to consider, but, speaking for myself, I am not prepared to make an exception to the general rule in the present case. This money became payable at the lunatic's death, and it was the intention of the parties that it should be paid out of the land

(1) L. R. 8 Eq. 331, 336. (2) (1883) 23 Ch. D. 472.
(3) L. R. 14 Eq. 291, 294.

purchased. In my opinion, the Court would not be giving proper effect to that intention if it refused to allow interest on the sum charged from the time at which the principal sum became payable, that is to say, from the death of the lunatic. I therefore agree that this appeal fails.

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Solicitors: *Woodcock Ryland & Parker, for Preston & Francis, Bournemouth; Brown, Ringrose & Lightbody.*

G. I. F. C.

DAVIS *v.* TOWN PROPERTIES INVESTMENT CORPORATION, LIMITED.

C. A. 1903 *March* 12, 20.

[1902 D. 50.]

Landlord and Tenant — Covenant for Quiet Enjoyment—Breach — Assignee of Reversion—Purchase of adjoining Property after Date of Lease—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 11.

In 1897 a lease of offices for a term of fourteen years was granted to the plaintiff by the then owner of the freehold. The lease contained the ordinary covenant by the lessor, for himself, his executors, administrators and assigns, for the quiet enjoyment of the demised premises by the lessee. In 1898 the lessor conveyed the reversion, subject to the lease, to the defendants. In 1900 the defendants purchased from a stranger a house adjoining the demised premises, pulled it down, and erected on the site a new building of such a height that it caused one of the plaintiff's chimneys to smoke so as to affect materially his enjoyment of one room:—

Held, that the defendants were not liable for a breach of the covenant for quiet enjoyment, inasmuch as at the date of the demise the lessor had no interest in the adjoining premises, and could not and did not for the benefit of the lessee put any fetter on their enjoyment, but undertook to respect rights of the lessee which were limited by the fact that the owner of the adjoining land might, if he were so minded, build on it so as to interfere with the draught of the lessee's chimneys.

Decision of Byrne J., [1902] 2 Ch. 635, affirmed.

The ordinary covenant for quiet enjoyment does not enlarge the grant. So far as the covenant is personal or collateral it does not run with the land.

Per Romer and Cozens-Hardy L.JJ. Whether *Tebb* v. *Cave*, [1900] 1 Ch. 642, was rightly decided, *quære.*

Per Romer L.J. Whether an indirect interference with the enjoyment

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of demised land (not affecting the title or the possession) is a breach of the lessor's covenant for quiet enjoyment, *quære*.

Per Cozens-Hardy L.J. Sect. 11 of the Conveyancing Act, 1881, has in no way altered the old law as to the class of covenants the burden of which will run with the land.

APPEAL from the decision of Byrne J. (1)

The facts were thus stated in the former report, and this statement was adopted as accurate by Collins M.R. in his judgment.

On June 3, 1897, a lease was granted by Mr. R. G. W. Lee to the plaintiff of offices on the ground floor of 119, Colmore Row, Birmingham, for a term of fourteen years from September 29, 1897, at a yearly rent of 100*l*. The lease contained a covenant for quiet enjoyment.

On September 28, 1898, the reversion of 119, Colmore Row, expectant upon the determination of the lease to the plaintiff, was assigned by Lee to the Town Properties Investment Corporation, Limited, the defendants.

In the year 1900 the company purchased from a Mr. Barber, who had no connection with Lee, a house next door to 119, Colmore Row, and proceeded to pull it down and erect new buildings on its site to a much greater height than the old buildings. This caused the chimneys in the plaintiff's offices to smoke so as materially to interfere with the quiet enjoyment of one of his rooms.

The plaintiff brought this action for a declaration that the acts of the company constituted a breach of the covenant for quiet enjoyment, and for an injunction.

The form of the covenant was as follows: "And the lessor doth hereby covenant with the lessee that the lessee paying the rent hereby reserved and observing the covenants and conditions herein contained and on the part of the lessee to be observed and performed shall and may peaceably and quietly possess and enjoy the said offices during the said term without any eviction or disturbance by the lessor or any person lawfully or equitably claiming from or under him." By another clause in the lease it was provided that the expression "the lessor"

(1) [1902] 2 Ch. 635.

should include Lee's executors, administrators and assigns, where the context allowed.

On a motion for an interim injunction, it was agreed that the company should carry up the plaintiff's chimney to the height of the new buildings, and that he, if he failed in the action, would pay the expenses of thus carrying up the chimney, and of removing it and restoring the wall to its former condition.

Byrne J. held that the obligations of the lessor must be considered as at the date of the lease, and that as the defendants had done the acts complained of, not as authorized by or claiming through or under the lessor, but by virtue of an independent title acquired by them subsequently to the date of the lease, there had been no breach by them of the covenant for quiet enjoyment.

The action was accordingly dismissed.

The plaintiff appealed.

Norton, *K.C.*, and *E. Clayton*, for the plaintiff. The covenant for quiet enjoyment entered into by Lee binds his assigns, and it is submitted that the defendants as his assigns are personally liable upon the covenant. If the plaintiff were suing Lee upon the covenant, he would have no answer to the action; and the defendants stand in the same position. Their acquisition of the adjoining property has nothing to do with the covenant. The covenant was entered into with reference to the subject-matter of the lease, and the obligation of it is, by s. 11 (1) of the Conveyancing Act, 1881, "annexed and incident to" the

(1) Sect. 11: "(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

"(2.) This section applies only to leases made after the commencement of this Act."

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reversion immediately expectant on the term. But the obligation of the covenant cannot be measured only by the demised property; it extends to the whole of the covenantor's property. He is liable for every disturbance by him which affects the covenantee's enjoyment of the demised property. It was admitted before Byrne J. that causing chimneys to smoke was a breach of the covenant, as was decided by Buckley J. in *Tebb* v. *Cave*. (1) Of course, the plaintiff cannot sue upon the covenant any one who does not claim through or under Lee.

[ROMER L.J. Lee covenanted for the acts of his assigns. But can he be liable for what his assign does on adjoining land?]

The covenant runs with the land, but the assign is liable only in respect of his own acts.

[COLLINS M.R. A covenant which runs with the land can be assigned; a personal covenant cannot.]

If Lee had purchased the adjoining house and had done what the defendants have done, he would clearly have been liable on the covenant, and his assign is liable on it as regards anything touching the demised land. Of course the assigns are liable only for their own acts. But every one who lawfully claims through the lessor is, it is submitted, liable for his own acts: *Sanderson* v. *Berwick-upon-Tweed Corporation*. (2) *Booth* v. *Alcock* (3) may be relied on for the defendants, but it was a decision that a lessor had not derogated from his grant. It did not turn upon a covenant for quiet enjoyment. In the present case the plaintiff's only remedy is for breach of the covenant for quiet enjoyment. There would be no remedy against the owner of the adjoining house if he were not the plaintiff's lessor: *Bryant* v. *Lefever*. (4)

[COLLINS M.R. referred to *Harrison, Ainslie & Co.* v. *Lord Muncaster*. (5)]

That case is really an authority in the plaintiff's favour. As regards his own acts, the assign of the reversion stands in the same position as the lessor.

(1) [1900] 1 Ch. 642.
(2) (1884) 13 Q. B. D. 547.
(3) (1873) L. R. 8 Ch. 663.
(4) (1879) 4 C. P. D. 172.
(5) [1891] 2 Q. B. 680.

[ROMER L.J. The lessor had no power to bind the person entitled to the reversion except in relation to the reversion.]

In *Harrison, Ainslie & Co.* v. *Lord Muncaster* (1) it was held that the acts complained of were not an "interruption" within the meaning of the covenant for quiet enjoyment; if there had been an interruption, the defendants as assigns of the lessor would have been liable on the covenant. It is immaterial that the act is not done upon the demised land.

[ROMER L.J. Does the covenant apply to an act done upon other land which only indirectly affects the enjoyment of the demised land?]

Tebb v. *Cave* (2) shews that it does. No doubt the covenant for quiet enjoyment does not enlarge the grant: *Leech* v. *Schweder* (3); but the plaintiff's claim is not founded on any enlargement of the grant made by his lease.

[COZENS-HARDY L.J. referred to *Robinson* v. *Kilvert*. (4)]

There the decision was that the interference with the plaintiff's enjoyment was not sufficient to render the lessor liable. In the present case the interruption amounts to an eviction of the plaintiff; it renders it impossible for him to make use of the offices. It is submitted that the lessor could be sued on the covenant, and if so the assign can be sued in respect of his own acts. If any person interested in the reversion is doing an act which interrupts the lessee's enjoyment of the demised premises, both he and the covenantor are liable on the covenant. The liability of an assign of the reversion is really founded on the statute 32 Hen. 8, c. 34, s. 2, of which s. 11 of the Conveyancing Act, 1881, is a repetition. That section throws upon the assign the same burden as that which was imposed on the lessor, and it applies to all covenants which touch and concern the demised land.

Levett, K.C., and *Austen-Cartmell*, for the defendants. The covenant should be construed as on the day on which it was entered into. An expanding covenant is not known to the law. A covenant cannot vary from day to day in its operation. It is submitted that the lessor himself is not liable on the

(1) [1891] 2 Q. B. 680.
(2) [1900] 1 Ch. 642.
(3) (1874) L. R. 9 Ch. 463.
(4) (1889) 41 Ch. D. 88.

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covenant for the acts of which the plaintiff complains. At the time when the lease was executed both the lessor and the lessee knew that the adjoining land belonged to a third person, who had certain rights in respect of that land, and upon that footing the covenant must be construed. The covenant may apply to all the property owned by the lessor at the date of the lease; it cannot apply to property acquired by him subsequently. The argument for the plaintiff amounts to this—that by the covenant he got something which he could not get by the grant. That is contrary to *Leech* v. *Schweder*. (1) The assign can be bound only by a covenant which runs with the land, and such a covenant does not affect adjoining land. The judgment of Bowen L.J. in *Harrison, Ainslie & Co.* v. *Lord Muncaster* (2), shews how such a covenant ought to be construed—that is, "so as to give effect to what may be reasonably supposed to be intended by the lessor and lessee."

Norton, K.C., in reply. It is not contended that the covenant confers rights varying from time to time; it imposes a personal liability upon the owner of the reversion. The liability arises from an "active," not a "passive" breach of the covenant. [He referred to *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson*. (3)]

Cur. adv. vult.

March 20. COLLINS M.R. read the following judgment:—This is an appeal from a decision of Byrne J. I adopt the facts as stated in the report. (4) [His Lordship read the statement, and continued:—]

Byrne J. has decided in favour of the defendants, and in my opinion he was clearly right. It is only necessary to scrutinize the covenant on which the plaintiff sues to see that this must be so. It is the ordinary covenant against eviction or disturbance by the lessor, or any person lawfully claiming under him. In other words, it contains no special provisions enlarging the obligation of the lessor to respect or secure any other rights than those incident to the demised premises such as they were

(1) L. R. 9 Ch. 463.
(2) [1891] 2 Q. B. 688.
(3) [1898] 2 Ch. 394.
(4) [1902] 2 Ch. 635.

at the time of the demise. It is quite clear that, unless there are special words, the covenant for quiet enjoyment does not enlarge the grant. In dealing with a similar covenant in *Leech* v. *Schweder* (1) Mellish L.J. said: "It is simply a covenant for quiet enjoyment; and I am clearly of opinion that it does not enlarge the right in any way. It is perfectly true that the lessee is 'to hold and enjoy without any suit, let, or hindrance.' But what is he to hold and enjoy? 'The premises.' What are the premises? The things previously demised and granted. The covenant does not enlarge what is previously granted, but an additional remedy is given, namely, an action for damages if the lessee cannot get, or is deprived of that which has been previously professed to be granted." Here then the lessor had no interest in the adjoining premises at the time of the demise to the plaintiff. He could not and did not put any fetter on their enjoyment for the benefit of the plaintiff, and the rights of the plaintiff which the lessor undertook to respect were rights limited by the fact that the adjoining owner might, if so minded, build on the adjoining land so as to interfere with the draught of the plaintiff's chimney. Such an interference, therefore, by raising the wall of the adjoining house, is not by whomsoever done an interference with any right granted by the original demise. It was on these principles that the case of *Booth* v. *Alcock* (2) was decided by the same judges. There a lessor granted a lease of a house with its appurtenances, including lights. There was the usual covenant for quiet enjoyment. At the time of the demise the lessor was tenant for a term of the adjoining house. He afterwards bought the reversion upon his term, and after the expiration of the term began to build on the site of the adjoining house so as to interfere with the plaintiff's lights. It was held that the plaintiff could not complain. He had acquired no right to light passing over the adjoining house other than that which it was in his lessor's power to bestow, which was necessarily only during the duration of his interest therein, and consequently interference by the lessor himself with the lights passing over the site of the adjoining house after the term was ended

(1) L. R. 9 Ch. 474. (2) L. R. 8 Ch. 663.

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involved no breach of the covenant for quiet enjoyment. He had not interfered with any right granted by the demise. "General words in a grant," said Mellish J. (1), "must be restricted to that which the grantor had then power to grant, and will not extend to anything which he might subsequently acquire." The case before us is a much stronger one for the defendant. He is not the original lessor, but is assignee of the reversion on the lease, and is liable only in that capacity, and the right said to be interfered with is not the well-known easement of light, but something which is not the subject of grant or prescription: *Webb* v. *Bird* (2); *Bryant* v. *Lefever* (3); *Chastey* v. *Ackland*. (4) Even if the lessor's covenant could be extended to cover user by him of land subsequently acquired, such an obligation could not pass with the assignment of the reversion to the defendants, who acquired the adjoining land under another title, and have done what they have done under that other title, and not as claiming under the lessor. So far as the covenant was personal or collateral, it would not run with the reversion and bind the assignee. This was decided on the statute of Hen. 8 in *Spencer's Case*. (5) The facts of the present case take it outside *Tebb* v. *Cave* (6), which we are therefore relieved from considering. Neither is it necessary in this case to speculate on what must be taken to have been the intention of the parties in making the covenant, since here the grant speaks for itself, and the covenant is unambiguous. But, if it were necessary to resort to such reasoning, the particular mischief and the sequence of events here were quite as unforeseen as in *Harrison, Ainslie & Co.* v. *Lord Muncaster*. (7)

The appeal must be dismissed.

ROMER L.J. read the following judgment:—I agree, and I only wish to add that, in the case of an alleged breach of the ordinary covenant for quiet enjoyment, where by the alleged breach neither the title to the land nor the possession of the land is affected, and what the lessee complains of is only an

(1) L. R. 8 Ch. 667.
(2) (1861) 10 C. B. (N.S.) 268; (1863) 13 C. B. (N.S.) 841.
(3) 4 C. P. D. 172.
(4) [1895] 2 Ch. 389.
(5) (1583) 5 Rep. 16 a.
(6) [1900] 1 Ch. 642.
(7) [1891] 2 Q. B. 680.

interruption of his enjoyment of the land by some act of the lessor, I doubt whether the act complained of is a breach of the covenant unless it amounts to a direct interference with the enjoyment. I doubt, therefore, whether *Tebb* v. *Cave* (1) was rightly decided on the ground of breach of covenant, seeing that in that case the defendant was not directly interfering with the plaintiff's house. The plaintiff in that case had no right to any easement in respect of the current of air coming over the defendant's land, and the plaintiff's chimneys smoked simply because that current of air was interfered with, and not otherwise by any act of the defendant.

COZENS-HARDY L.J. read the following judgment:—I have read the judgment of the Master of the Rolls, with which I entirely agree. I share the doubt expressed by Romer L.J. whether the decision of Buckley J. in *Tebb* v. *Cave* (1) can be supported. Should the question raised in that case hereafter come before the Court of Appeal, it will be necessary to consider carefully the true limits and extent of the covenant for quiet enjoyment.

There is only one point which I desire to mention. Mr. Norton, in his able argument for the appellant, relied mainly upon s. 11 of the Conveyancing Act, 1881, and contended that the obligation of every covenant entered into by a lessor who is owner in fee "with reference to the subject-matter of the lease" is now annexed to and goes with the reversionary estate, so that it may be taken advantage of and enforced against any person entitled to the reversionary estate. This covenant, he urged, has reference to the subject-matter of the lease, and therefore binds the lessor throughout the term, and also binds the defendants so long as the immediate reversion is vested in them. I cannot adopt this view. It seems to me that s. 11 in no way alters the old law as to the class of covenants the burden of which will run with the reversion.

Solicitors: *C. P. Eaton Taylor; F. A. K. Doyle, for S. T. Talbot, Birmingham.*

(1) [1900] 1 Ch. 642.

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KEKEWICH J.

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March 13.

LAMBOURN *v.* McLELLAN.

[1903 L. 19.]

Landlord and Tenant — Covenant — Construction — Trade Fixtures — General Words—Ejusdem Generis.

An underlease of premises to be used for the business of a boot and shoe manufacturer contained a covenant by the lessee to yield up the premises on the determination of the term, "together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stones, marble and other chimney-pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales, rails, dressers, shelves, and all other erections, buildings, improvements, fixtures and things which then were or which at any time during the said term should be fixed, fastened or belong to the said demised messuage and premises or any part thereof":—

Held, that the covenant, by reason of the general words contained therein, extended to the trade fixtures used in the lessee's business of a boot and shoe manufacturer.

Bidder v. *Trinidad Petroleum Co.*, (1868) 17 W. R. 153, followed.

TRIAL OF ACTION.

By an indenture of underlease dated February 16, 1899, and made between the plaintiff, Thomas Nixon, of the one part and Louis Solomons of the other part, Nixon demised a messuage and premises known as No. 6, Crispin Street, Spitalfields, in the county of London, and then in the occupation of Solomons, to Solomons for the term of twenty-one years from September 29, 1898, at the yearly rent of 95*l.* during the first two years of the term, and at the yearly rent of 100*l.* for the remainder of the term; and by the said indenture Solomons amongst other things covenanted with Nixon that Solomons would keep the demised premises in repair as therein mentioned, and the same and every part thereof so repaired would at the end and expiration or other sooner determination of the said term peaceably and quietly leave, surrender, and yield up unto Nixon, "together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stones, marble and other chimney-pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales,

rails, dressers, shelves, and all other erections, buildings, improvements, fixtures and things which then were or which at any time during the said term should be fixed, fastened or belong to the said demised messuage and premises or any part thereof."

There was also a covenant by Solomons that he would not use, exercise, or carry on, or permit to be used, exercised, or carried on, in any part of the demised premises any trade or business whatsoever except that of a boot and shoe manufacturer, without the licence and consent of the lessor Nixon or his superior landlord in writing first had and obtained; and also that he, Solomons, would not erect on the premises any machinery other than that propelled by hand or foot without the consent in writing of Nixon.

By an indenture of May 30, 1902, the premises comprised in the indenture of February 16, 1899, were sub-demised by the plaintiff Nixon to the plaintiff Jabez Lambourn by way of mortgage for securing the payment of 600*l.* and interest.

In November, 1902, Solomons was adjudicated bankrupt, and the defendant Henry McLellan was appointed trustee of his property in the bankruptcy.

The defendant as trustee in bankruptcy advertised for sale by auction on the premises demised by the underlease of February 16, 1899, certain stock-in-trade and machinery which comprised the following articles, namely:—(A) On the second floor of the messuage, three wooden stands reaching from floor to roof. (B) On the first floor of the messuage, four heel-building machines, one heel-attaching machine, and one channelling machine. (C) On the ground floor of the messuage, one heel-finisher machine or heel-trimmer, one sole-edge trimming machine or edge-setter, one scouring machine, four wooden stands reaching from floor to roof, and certain fitted shafting and other machinery (including a conveyor and piping); and (D) in the basement, an electric motor machine.

The plaintiffs requested the defendant to withdraw the above-mentioned articles from the sale, on the ground that they were the property of the plaintiffs by virtue of the covenants in the underlease, which was still subsisting, and was

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vested in the defendant as trustee in bankruptcy. The defendant declined to withdraw the articles from the sale, and contended that he was entitled to sell them separately, and so as to involve their removal from the premises; and the plaintiffs thereupon brought this action, claiming a declaration that the defendant was not entitled to remove or cause the removal from the demised premises of the articles, or any other erections, buildings, improvements, fixtures, or things which then or at any time during the term created by the underlease of February 16, 1899, had been or should be fixed, fastened, or belonging to the demised premises or any part thereof; and an injunction to restrain such removal.

On January 6, 1903, the plaintiffs obtained an interim injunction, and the action now came on for trial.

It was not disputed that the articles now in question were articles used in the bankrupt's trade of a boot and shoe manufacturer, and that they were affixed to the premises within the principle of *Hobson* v. *Gorringe* (1) and *Reynolds* v. *Ashby & Son, Limited* (2), and earlier cases; and the only question for argument, therefore, was whether the articles, being trade fixtures, were subject to the covenant contained in the underlease for the yielding up of fixtures and other articles as above mentioned.

Warrington, K.C., and *Rolt*, for the plaintiffs. The concluding words of this covenant comprising "all other erections, buildings, improvements, fixtures and things which then were or at any time during the said term should be fixed, fastened, or belong to" the premises are wide enough to exclude any right which, in the absence of special provision, the tenant might have to remove trade fixtures. In *Wilson* v. *Whateley* (3) there was a covenant very similar in its terms to this covenant. There, as here, there was an enumeration of numerous specified articles, "and other additions, improvements, and things" which were and should be fixed or fastened upon the premises, and Wood V.-C. was of opinion that, as it was difficult to say

(1) [1897] 1 Ch. 182. (2) [1903] 1 K. B. 87.
(3) (1860) 1 J. & H. 436.

to what common genus the enumerated articles belonged, the general words could not be restricted to articles ejusdem generis with them, and that the lessee could not make a marketable title even to articles in the nature of tenant's fixtures. That was not a direct decision, because it arose as between vendor and purchaser; but the subsequent case of *Bidder* v. *Trinidad Petroleum Co.* (1) appears to be a decision directly in point, and, indeed, not distinguishable from the present case. There the concluding words of the covenant were, "pumps, pipes, cisterns, and other things which now are or at any time during the said term shall be fixed or fastened to the freehold of the said premises or belong thereto," and it was held that trade fixtures used in the lessee's business of an oil-refiner were included in the covenant. The only case to the contrary is *Bishop* v. *Elliott* (2), where the specified articles being held by the Court to be such as are commonly called landlord's fixtures, the general words which followed were held to be limited to articles ejusdem generis, so that the lessee was not restrained from disposing either of the tenant's fixtures or the trade fixtures. But in that case the general words of the covenant extended only to "fixtures and articles in the nature of fixtures," and were, therefore, much less wide than the words in the present case and in each of the two cases of *Wilson* v. *Whateley* (3) and *Bidder* v. *Trinidad Petroleum Co.* (1)

Stewart-Smith, K.C., and *E. Ford*, for the defendant. *Bishop* v. *Elliott* (2), which was a decision of the Exchequer Chamber, is an authority for the broad proposition that the general words in a covenant of this kind ought to be read in connection with the particular words which precede them, and confined to things which are ejusdem generis with the articles so specified. In the present case the word "machinery" is not to be found in the enumeration of specified articles, and the specific words are all referable to ordinary fixtures as between landlord and tenant, and not to trade fixtures. There is no indication in the lease of any intention to include the trade fixtures. On the contrary, the lease expressly contemplates that the business of

(1) 17 W. R. 153. (2) (1855) 11 Ex. 113. (3) 1 J. & H. 436.

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a boot and shoe manufacturer is to be carried on upon the premises, and the absence of any words appropriate to include trade fixtures is therefore the more significant. The case of *Wilson* v. *Whateley* (1) had reference to a residential house in Belgrave Street, and no question as to trade fixtures arose. No doubt the terms of the covenant in *Bidder* v. *Trinidad Petroleum Co.* (2) were very similar to those in the present case; but when the case itself is examined, it will be found to differ in material respects. The lease there contained a covenant to lay out 3000*l.* in the erection of buildings and works such as are usually erected for the distillation of oil. The covenant mentioned "pumps, pipes, cisterns, and other things," cisterns being articles especially necessary in carrying on the business of oil-refining, and Lord Romilly relied upon that circumstance as indicating an intention to include the trade fixtures. It is submitted, therefore, that *Bidder* v. *Trinidad Petroleum Co.* (2) ought to be treated as a case of a special character, and that the present case is within the principle of *Bishop* v. *Elliott.* (3)

KEKEWICH J. The first point to be considered is whether I can in any way restrict the general words "erections, buildings, improvements, fixtures and things." It seems to me that, according to the line of reasoning adopted by the Vice-Chancellor in *Wilson* v. *Whateley* (1), I cannot restrict the words. Mr. Stewart-Smith has rightly pointed out that machinery is not mentioned here. But, though there are no words which directly refer to machinery, it might come under "erections" or "improvements": probably it would not come under the word "buildings"; but then we have "fixtures and things," and there are so many things specified, and coming under different classes, that it seems to me to be impossible to say that this covenant can be construed so as to restrict it to things ejusdem generis with those specified, and therefore to exclude machinery because it is not included under some other words. The result is that we have here a covenant which includes everything in respect of which it can be predicated

(1) 1 J. & H. 436. (2) 17 W. R. 153. (3) 11 Ex. 113.

that it is fixed according to the terms of the lease. Then there are the words "fixed, fastened, or belong to" the demised messuage and premises. In one sense a chattel unfixed may be said to "belong" to a building; but if the fixtures "belong" to the messuage the whole question is concluded, and the verbiage about things which are fixed becomes superfluous. The phraseology of the covenant is confusing, but it does not seem to me to stand alone, because I find almost the same covenant in *Bidder* v. *Trinidad Petroleum Co.* (1), on which the plaintiffs properly relied. I observe that according to the report the very point which has been argued now before me was argued there by Mr. Southgate, namely, that the covenant in the lease was only intended to apply to ordinary tenants' fixtures, and not to trade fixtures, and it is that point which Lord Romilly decided against his argument. The words are not precisely the same as in the present case, but very nearly so: "pumps, pipes, cisterns, and other things which now are or at any time during the said term shall be fixed or fastened to the freehold of the said premises or belong thereto." For all the purposes of the present case, the concluding words are the same as the words in the present case. In *Bishop* v. *Elliott* (2), which at first sight is a decision the other way, the words were: "locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs, and other fixtures, and articles in the nature of fixtures, which shall, at any time during the said term, be fixed or fastened to the said demised premises, or be thereto belonging." Under that form of words the Court was enabled to hold that trade fixtures were not covered by the covenant, because the general words could be limited to fixtures other than trade or tenant's fixtures. There is a substantial distinction between that case and *Bidder* v. *Trinidad Petroleum Co.* (1), and I do not see my way to do otherwise than decide this case according to the last-mentioned authority. I do not think it would be right for me as a judge of first instance to do more than say that I follow it.

Solicitors: *Morgan, Upjohn & Leech; Stanley Evans & Co.*

(1) 17 W. R. 153. (2) 11 Ex. 113.

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Feb. 12, 13.

In re NEWEN.
CARRUTHERS *v.* NEWEN.

[1902 N. 270.]

Solicitor and Client—Writ issued in District Registry—Country Agent Solicitor on Record for London Principal—Scope of Country Agent's Authority—London Agent's Authority—Compromise—Lay Client bound—Rules of Supreme Court, 1883, *Order* IV., *rr.* 1, 3; *Order* XII., *r.* 10.

The solicitor on the record—whether in London as agent for a country solicitor or in a district registry as agent for a London solicitor—has a general authority to compromise an action on behalf of his client, provided he acts bonâ fide and reasonably, and not in defiance of his direct and positive instructions; and in either case the lay client will be bound although there is no privity between him and the agent on the record.

The principle of *Prestwich* v. *Poley*, (1865) 18 C. B. (N.S) 806; and the dicta in *Withers* v. *Parker*, (1859) 28 L. J. (Ex.) 292; on appeal, (1860) 29 L. J. (Ex.) 320—that there is no distinction between the act of the London agent and the act of the country solicitor—approved and applied.

Trustees issued an originating summons in the Liverpool District Registry for directions in certain matters relating to the trust estate. An appearance was entered in the district registry by Liverpool solicitors as agents for London solicitors, who were the principal solicitors of the defendants, the beneficiaries under the trust. The defendants objected to the application as unnecessary, and on their behalf a summons was taken out to transfer the proceedings to London. Prior to the hearing of the two summonses the London solicitors wrote their Liverpool agents, "Failing an order dismissing the plaintiffs' application with costs, and giving costs on our application, you will please adjourn the matter to the judge." When the two summonses were heard by the registrar, the Liverpool agents, after some discussion, agreed that no order should be made except that the costs of all parties should be paid out of the estate. On motion by the defendants to discharge this order:—

Held, on the evidence, that it was a consent order; that the letter did not prohibit a compromise; and that the defendants were bound by the act of the Liverpool agents.

MOTION to discharge an order made in chambers in the Liverpool District Registry under these circumstances.

On December 15, 1902, an originating summons was issued in the Liverpool District Registry by R. Carruthers and H. A. Clarke, two of the trustees of the will of G. Newen, deceased, asking that directions might be given to the trustees

with reference to the notices served upon them on behalf of certain railways, and that the trustees might be authorized and empowered to oppose the bills of the said railways before Parliament, and that the costs of the application as between solicitor and client and of the said oppositions might be provided for out of the trust estates.

The defendants to this summons were Lydia Newen and Eliza Newen, the two tenants for life under the will; and G. H. Davey, the third trustee, and also the remainderman under the will. An appearance was entered in the Liverpool District Registry for the defendant tenants for life by Messrs. Jevons & Ryley, Liverpool solicitors, acting on instructions from and as agents for Messrs. Smiles & Co. of London, who were the principal solicitors for the same defendants; and in the same way Messrs. Solly & Marshall of Birkenhead entered an appearance in the Liverpool District Registry as agents for Messrs. Robbins, Billing & Co. of London, who were the principal solicitors for the defendant Davey.

The plaintiffs' summons was strongly opposed by the defendants, who filed affidavits, alleging that the application was unnecessary and only made for the purpose of making costs, and also making certain charges against the plaintiffs.

On December 23 the said agents on the record in the Liverpool District Registry, on instructions from their London principals, took out a summons on behalf of the defendants asking that the proceedings under the plaintiffs' summons might be transferred to London; and on January 9, 1903, the London solicitors sent final instructions on the two summonses to their said agents as follows: "Failing an order dismissing the plaintiffs' application with costs, and giving costs on our application, you will please adjourn the matter to the judge."

On January 12 both summonses were heard by the Liverpool district registrar, and, after considerable discussion, no order was made except that the costs of all parties as between solicitor and client should be taxed and paid out of the estates. This order, which was still in minutes, did not appear on the face of it to be a consent order, but the plaintiffs alleged that the words "by consent" had been omitted in the draft order

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by mistake. The defendants contended that it was not a consent order; and on January 17 the defendant tenants for life served the three trustees with a notice of motion asking that the order of January 12 might be discharged with costs, and that the proceedings in the matter might be removed to London. The motion now came on for hearing.

Mr. Ryley and the managing clerk of Messrs. Solly & Lees gave evidence as to what took place before the registrar on January 12. The effect of their evidence is sufficiently noticed in the arguments and judgment.

R. J. Parker and *E. F. Spence*, for the motion. On the evidence, what took place before the registrar did not amount to a consent. But if a consent was given, it was given unintentionally, and it is open to the defendants to move to discharge the order before it is perfected. The position is analogous to that of a London agent and country solicitor. The authority of a London agent is limited to his written instructions, and he has no discretion to go beyond them. It is the principal solicitor who has a general authority to compromise, and he cannot delegate that authority to his agent in the country. But even if the Liverpool agents had an implied authority to compromise, what was done before the registrar was in contravention of their positive written instructions, and does not bind their principals: *Malins* v. *Greenway*. (1)

W. H. Cozens-Hardy, for the defendant Davey, supported this contention.

Upjohn, K.C., and *J. Rutherford*, for the plaintiff Carruthers. The Liverpool agents are the solicitors on the record in the district registry for the defendants, and therefore the question of delegated authority does not arise. It is the solicitor on the record, whether he is principal solicitor or a London agent, who has a general authority to compromise, provided he acts bonâ fide and reasonably, and not in defiance of his positive instructions: *Latuch* v. *Pasherante* (2); *Prestwich* v. *Poley* (3); *Fray* v. *Voules* (4); *Chown* v. *Parrott* (5); *Griffiths* v. *Wil-*

(1) (1847) 17 L. J. (Ch.) 26.
(2) (1696) 1 Salk. 86.
(3) 18 C. B. (N.S.) 806.
(4) (1859) 1 E. & E. 839.
(5) (1863) 14 C. B. (N.S.) 74.

liams (1); *Withers* v. *Parker* (2); and what applies to a London agent also applies to a country agent who is on the record in a district registry for a London principal. It is the solicitor on the record who has the general authority to compromise. *Malins* v. *Greenway* (3) is not in point. Therefore, the Liverpool agents here had a general authority to compromise this action, and that general authority could not be limited except by express prohibition; but the letter of January 9 did not prohibit a compromise if they thought it beneficial.

[FARWELL J. referred to *Neale* v. *Gordon Lennox*. (4)]

The Court there said that their decision did not overrule any decided case. Lastly, this is not a case of mistake, but of a change of mind. A consent cannot be arbitrarily withdrawn: *Harvey* v. *Croydon Union Rural Sanitary Authority*. (5) Relief, no doubt, may be given on the ground of mistake: *Tamplin* v. *James*. (6) But there was no mistake here. The parties were ad idem before the registrar.

Butcher, *K.C.*, and *H. Mather*, for the plaintiff Clarke, who had severed on the motion, adopted the same arguments.

R. J. Parker, in reply. Country solicitors, who do not take out a licence to practise in London, enter an appearance in London under Order IV., r. 3, by a London agent, but the London agent on the record is not the solicitor of the lay client. It is the country solicitor who is the principal solicitor. In the same way London solicitors, who do not take out a licence to practise in the country, enter an appearance in a district registry by a country solicitor under Order XII., r. 10. But the country solicitor is only agent on the record for the London principal, and there is no privity of contract between the agent on the record and the lay client. Here the agents on the record had no authority to compromise, and acted beyond the scope of their positive instructions contained in the letter of January 9. Those positive instructions negatived any implied authority on any other point, and the lay clients are

(1) (1787) 1 T. R. 710.
(2) 28 L. J. (Ex.) 292; on appeal, 29 L. J. (Ex.) 320.
(3) 17 L. J. (Ch.) 26.
(4) [1902] A. C. 465.
(5) (1884) 26 Ch. D. 249.
(6) (1880) 15 Ch. D. 215.

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not bound: *Wray* v. *Kemp*. (1) In *Withers* v. *Parker* (2) the facts were very different from the present case, and the dicta in the judgments were not necessary for the decision. There, the country solicitor acted in a dual capacity. He was solicitor for the lay client, and also had an individual interest. The lay client was bound by the assent of his solicitor, and it was held that it was not open to the latter months afterwards to repudiate in his individual capacity.

FARWELL J., after dealing with the evidence at length, and after stating that, on the evidence before him and on the registrar's report to him of what occurred on January 12, he was convinced that all parties agreed to the order of January 12, and that it was in fact a consent order, continued:—But it has been pressed upon me, and I agree, that it would not be right to bind the defendants to treat this as a consent order, drawn up, passed and entered, because it would have been open to them while the order was in minutes to object to having the order passed and entered as a consent order if the consent had not really been given, or had been given under some mistake, which would have entitled them to be relieved therefrom. Now, treating it, first of all, as an order which has come to me in minutes, was there any mistake? In my opinion there was none at all. The parties clearly understood what they were doing, and they adopted a very sensible and proper course, and I am wholly unable to understand what is the meaning of the attempt now made to upset the matter. When the motion was opened I could not understand why the lay clients, or any one really interested, wanted to contest such a matter as this, and I desired that some evidence should be given of repudiation by the lay clients of any authority to compromise. The only person called has been the Liverpool solicitor, who has produced the letter of January 9, upon which he acted. That is the case relied upon for repudiation of authority. As regards mistake, nobody has been called to give any evidence that there was a mistake. The matter simply rests on the fact that the

(1) (1884) 26 Ch. D. 169.
(2) 28 L. J. (Ex.) 292; on appeal, 29 L. J. (Ex.) 320.

solicitor in Liverpool, the place where the appearances have been entered, received a letter from the London solicitors saying, "Failing an order dismissing Mr. Carruthers' application with costs, and giving costs on our application, you will please adjourn the matter to the judge in London." It is said that puts an absolute veto on any assent to any order except in the terms stated in the letter. I do not so read it. It seems to me that in matters of this sort, if parties desire to fetter the reasonable discretion of the persons who have the real conduct of the matter before the judge in chambers, it is their duty to be explicit. Let me test it in this way. Supposing that a lay client sues his solicitor for damages for negligence. It is within the scope of a solicitor's authority to compromise, and if he uses all due diligence and acts bonâ fide and reasonably, no action will lie against him; but if he has been expressly forbidden to compromise, and he does compromise, then, however beneficial that compromise may be, an action will lie against him for disregarding that express negative direction. Is it conceivable that anybody could hold that a solicitor would be liable in an action for damages on a letter of this sort on the ground that it is a distinct veto on his departing from the exact tenor of the directions in it? When the registrar in chambers points out to the parties the absurdity of going on and wasting money, and the fact that it will be necessary for the matter to stand over to have further affidavit evidence if they do not make up their minds, and that if an end of it is made at once very small expense has been incurred, and it will be much better for all parties to agree to no order being made, and to the costs of all parties being paid out of the estate—if it is not to be open to an agent to consent to that, when he has got general instructions like this, which, after all, are nothing more than the ordinary instructions to a solicitor to fight a case and win if he can, I fail to see how business could be conducted. If parties mean to say, "You shall not depart from a letter giving particular instructions," let them say so in express terms. But if the contention that has been put forward is right, it would have been impossible under this letter for Mr. Ryley to consent to an adjournment

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in order to give time to the plaintiffs to answer the defendants' affidavits. Such a contention appears to me to be extravagant.

The next point is this. It is said that Mr. Ryley had no authority to settle the matter at all. Now it is clear from the case of *Prestwich* v. *Poley* (1) that a solicitor has a general authority to compromise an action on behalf of his client. Sir Montague Smith's judgment expresses the general principle very plainly. He says (2): "The attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause. Every one must reasonably expect that a cause may not be carried to its natural conclusion, and that it is proper and usual, and often necessary, to compromise. The authorities seem to me to establish clearly that the attorney has power to compromise the action in a fair and reasonable manner." *Chown* v. *Parrott* (3) and *Latuch* v. *Pasherante* (4) are to the same effect. It is plain, therefore, that a solicitor has a general authority to compromise.

But then it is urged that Mr. Ryley was only the Liverpool agent on the record for the London principal, and that such an agent has no authority to compromise. No doubt there is no privity of contract between the agent-solicitor and the lay client: the contract is between the principal solicitor himself and his own client; but the exigencies of business render it necessary to have some one available and at hand upon whom notices and the like shall be served. The appropriate rule in the present case is Order XII., r. 10, under which, if the appearance is entered in a district registry, the address for service must be given within the district. The address for service, therefore, was to be within the Liverpool district, and Mr. Ryley was the person upon whom notices were to be served; but I am not prepared to accept the defendants' contention that a solicitor who is appearing on the record as agent for the principal solicitor—and, when I say on the record, I mean the solicitor whose address for service is given either under Order XII., r. 10, or Order IV., r. 3, as the solicitor acting as agent for the principal solicitor—has not the same power as

(1) 18 C. B. (N.S.) 806.
(2) Ibid. 816.
(3) 14 C. B. (N.S.) 74.
(4) 1 Salk. 86.

between himself and the lay client as the principal solicitor himself has. So to hold would lead to great inconvenience. It is quite true there is no privity, but it is also a well settled and understood practice that where there are country solicitors they employ London agents, and that the London agents conduct the business here in London. I have read from Sir Montague Smith's judgment the statement of the London agent's general authority. It is quite clear, and I did not understand Mr. Parker to contest, that to some extent the London agent has the same discretion as the country solicitor. Where, then, can you draw the line? Take Sir Montague Smith's statement, "Every one must reasonably expect that a cause may not be carried to its natural conclusion," and, "The attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause." How is this to be done in matters where questions arise suddenly in chambers, on points which it is urgent should be determined at once, if you have to refer to some remote part of the country because the London agent is a mere mouthpiece and has no authority whatever? In my opinion the Court of Exchequer and the Exchequer Chamber intended what they said in *Withers* v. *Parker* (1); and I entirely agree with them that it would be most calamitous that there should be any distinction between the London solicitor and the country agent for the purpose of details in managing a pending case, including the power to compromise. Take the dictum of Pollock C.B. (2): "I think an order made by the agent, professing, of course, to be made by him as the agent, and containing a statement operating as an admission that the other party, Parker, is actually then in possession—is a matter that he cannot gainsay. I think it is of considerable importance that we should not open a facility for disputing arrangements of this description by creating a difference between the assent of an attorney and the assent of the agent"—which means London agent—"It might lead to very inconvenient consequences if we did not consider, for the purposes of the suit, the agent and the attorney identically the

(1) 28 L. J. (Ex.) 292. (2) 28 L. J. (Ex.) 294.

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same." Then Martin B. says (1): "I do protest against any distinction being drawn between the act of the London agent and the act of the country attorney. If we make such a distinction, I do not know where we are to stop." And Bramwell B. says: "I think for all purposes of an authority an order, consented to by a London agent, ought to be considered as valid as though made by the principal, and the attorney to be bound by it. I think the order here was as effectual to bind both parties by whom it was made, as though they themselves had consented to it." And again he says (2): "I mention this that I may not be misunderstood, for I quite concur with my brother Martin, that nothing could be more disastrous (so far as that term may be applied to proceedings of this description), than that an order consented to by a London agent should be less binding, or have a different effect, than when consented to by the attorney in the country." I can only say, that if these learned Barons did not mean what they said, I do not understand for what purpose those observations were made, or why they were reported. In the Exchequer Chamber (3) the judgment of Cockburn C.J. and Williams, Crompton, Willes, Byles, and Blackburn JJ. was given by Cockburn C.J., and he says: "We entirely concur in the view taken by the Court below, that an attorney, as such, must necessarily be held to be bound by that which is done on his behalf by his agents in London." If the attorney, as such, is bound, then I think it is idle to say that his principal, the lay client, is not bound; for what is the use of binding the attorney if you do not bind the principal? The attorney is bound and the principal is bound also; and if the principal has any complaint, he can sue his own solicitor, who is responsible because he is bound by what his agent has done. It seems to me I should be quite wrong in attempting to explain away those very clear dicta, with which I respectfully and entirely agree. I think it would be calamitous if it were possible that parties, who have entered into an agreement such as this, should be able to get out of it on any such suggestions

(1) 28 L. J. (Ex.) 295. (2) 28 L. J. (Ex.) 296.
(3) 29 L. J. (Ex.) 320, 321.

as I have heard before me to-day. The result is that the whole of this application fails, and must be dismissed with costs.

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Solicitor for plaintiff Carruthers: *R. Carruthers, Liverpool.*

Solicitors for plaintiff Clarke: *Collins, Robinson & Co., Liverpool.*

Solicitors for defendants: *Smiles & Co.; Robbins, Billing & Co.*

H. L. F.

In re JOHNSON. ROBERTS *v.* ATTORNEY-GENERAL.

FARWELL J. 1903 *Feb.* 24.

[1896 J. 100.]

Conflict of Laws—Domicil—British Subject—Colonial Domicil of Origin—Subsequently acquired Foreign Domicil—Nationality—Renvoi.

Where a British subject, whose domicil of origin is colonial, acquires according to English law a domicil of choice in a country whose laws do not recognise domicil, but distribute the movables of a foreigner dying within their jurisdiction according to the law of his nationality, and dies there, the English Courts will distribute his movables according to the law of his domicil of origin.

The testatrix was a British subject born out of wedlock in Malta. Her father was an Englishman domiciled in England; her mother was a Maltese woman domiciled in Malta. They afterwards married in Malta. The testatrix left Malta in 1832, and died in 1894 domiciled at Freiburg in Baden. She made a will, but left some movables undisposed of. It was proved that the law of Baden paid no attention to domicil, but distributed the movables of a foreigner dying in Baden, who had not been naturalized, according to the law of the country of which he was a subject:—

Held, that the testatrix's movables must be distributed according to the law of Malta, not the municipal law of England, and therefore went to her next of kin, the testatrix being legitimatized by her parents' subsequent marriage.

THIS was the further consideration of an action commenced by originating summons in 1896 by the executors of Mary Elizabeth Johnson, who died on December 25, 1894, at Freiburg, in the Grand Duchy of Baden, having made a will which did not dispose of her whole property and appointed executors. The summons asked for an inquiry who were the persons entitled to the undisposed of personal estate of the testatrix,

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and for directions as to distributing it, and for administration if necessary. The only defendant was the Attorney-General.

Inquiries were directed, and from time to time orders were made directing further inquiries and giving leave to different persons who claimed to be next of kin to attend; and on January 8, 1902, the master made a certificate finding the following facts.

Mary Elizabeth Johnson, the testatrix in this action, was born in Malta in the year 1810; she was the daughter of Thomas Johnson, a British subject domiciled in England, and Marianna Attard, a Maltese subject of the British Crown, domiciled in Malta, and was of British nationality in the sense of having been born a subject of the British Crown. (1) Her parents were not married at the date of her birth, but married in Malta about five years afterwards, their respective domicils being then unaltered. The testatrix left Malta in 1832 or 1833, and never returned. At the date of her will and of her death she was domiciled in Freiburg, in the Grand Duchy of Baden. Her will gave certain pecuniary legacies and appointed executors, but contained no residuary bequest.

She left movables, partly in England and partly in Freiburg, more than sufficient to pay the legacies given by her will.

The testatrix was never legally naturalized in Baden, and the certificate found that according to the law of Baden her will was valid, but the legal succession to that part of her property which she had not disposed of by will was governed by the law of the country of which she was a subject at the time of her death.

By the common law of Malta in force at the date of her parents' marriage, a child born prior to the marriage and not being the offspring of adulterous intercourse (which was not suggested in this case) would be legitimatized by the subsequent marriage of the parents.

(1) It was mentioned at the hearing that this was doubtful. Malta was in 1810 in British occupation, but it was not formally annexed until 1814. But there was no summons to vary the certificate. The case was argued on the assumption that the certificate was correct. As the case was decided the result would have been the same if the testatrix had been a Maltese subject.

The master submitted to the Court, among other questions, whether the persons entitled to any personal estate, of which the testatrix died intestate, were to be found according to Maltese or English law.

Upjohn, K.C., and *Daniel Jones*, for the executors. The testatrix was at her death domiciled in Baden, and therefore by our law her movables ought to be distributed according to the law of Baden. But the law of Baden at the time of her death ignored domicil altogether, and said the distribution must be made according to the law of the testatrix's nationality—that is, of the State of which she was a subject. She was a subject of England, and the distribution of her estate must be governed by English law. It is true that there are many systems of law within the British Empire; but the law of England is dominant. That is shewn by the cases on Anglo-Indian domicil, which settled that the law of England was the personal law of British subjects domiciled in India, though they might be Scotsmen or natives of Cape Colony: *Moorhouse* v. *Lord*. (1)

The question depends on allegiance, and allegiance is a personal tie to the Sovereign. Thus in *Calvin's Case* (2) it was held that the postnati—subjects born in Scotland after the accession of James I.—were not aliens in England; and in the *Stepney Election Petition, Isaacson* v. *Durant* (3), it was decided that Hanoverians were not aliens in England when the Crowns of Hanover and England were united in the same Sovereign, and only became aliens when the Crowns were severed on the death of William IV.

The law of the Sovereign is the governing law, unless circumstances displace it. It may be that if a Mohammedan subject of England died in Baden, the distribution of his movables might be a question of Mohammedan law; but that would not depend on domicil, but on rights of religion or of race which the Sovereign has undertaken to respect.

Allegiance is not a matter of choice, but, where the allegiance

(1) (1863) 10 H. L. C. 272; 32 L. J. (Ch.) 295.
(2) (1608) 7 Rep. *27 b.
(3) (1886) 17 Q. B. D. 54.

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is due to the Sovereign of an empire where many laws prevail, the Court may look at the choice of domicil which the subject has made.

But here the only choice exercised by the testatrix was to abandon her Maltese domicil. It would be absurd to apply Maltese law in the case of a lady who died in Germany, having deliberately left Malta fifty years before.

Butcher, K.C., Austen-Cartmell, and *W. J. Whittaker,* for persons claiming to be the testatrix's next of kin according to Maltese law. There are two questions—one of private international law between England and Baden, and the other an infinitely more important question between the different parts of the British Empire. In the present case the Court has to administer the law of Baden at the time of the testatrix's death; but that law said "Go to the law of the country of which the deceased is a subject," and that leaves the whole question open for this Court to decide upon general principles. It must either apply the English municipal law in every case, or that of the domicil of origin. The admission that English law would not be applied to a Mohammedan is fatal to the executors' case. If that law does not apply in every case, it certainly ought not to be applied to the illegitimate daughter of a Maltese woman. In Bar's Private International Law, 2nd ed. p. 209, this case is suggested, and the author says the law of domicil must prevail. It would be a great hardship if a Scotsman who had acquired a domicil in any country where the law was the same as in Baden—and it is the same all over the Continent—should be held to have acquired an English domicil for the purpose of the distribution of his estate.

Lord Hatherley pointed out in *Udny* v. *Udny* (1) that a man who changed his domicil could not be said to intend exuere patriam.

[They also referred to Dicey on the Conflict of Laws, p. 77, and the *Law Quarterly Review,* vol. xiv. pp. 231, 232.]

R. J. Parker, for the Attorney-General. I do not think the Crown has any pecuniary interest in the matter; for if the Maltese law applies the next of kin takes, and if the English

(1) (1869) L. R. 1 H. L., Sc. 442.

law applies, without making any admission, I think the executors probably take. But the point is one of great practical importance, and it would be desirable to have a rule laid down which would be acceptable, not only in the English Courts, but in the Courts of Scotland and Canada, and wherever else in His Majesty's dominions the question fell to be decided. In cases of this sort our Courts lay stress on domicil, whereas most other Western nations lay stress on nationality, and as all their colonies are under the same law as themselves, questions like the present case do not arise. As I understand, the Baden law said (1) we should ignore domicil and decide according to the law of the State of which the deceased was a subject, namely, the British Empire, which embraces many systems of municipal law.

If this Court decides that the law of Malta governs the case, it will establish a clear rule, which might well be followed by all the Courts of the Empire. If it decides that English municipal law governs, the result will be that any colonist who accepts a foreign domicil of choice will be made to adopt an English domicil for the purpose of the distribution of his estate, which would be entirely contrary to his intention. Further, if the points were to be decided in Scotland or Canada, the Courts there might by parity of reasoning apply the Scottish or Canadian municipal law to the estate of an Englishman domiciled in Baden. In Consular Courts the law of each man's nationality is applied, and where there is, as in Egypt, a mixed code, it provides the same thing; so the question is of wide importance. It is most convenient and most consistent with the system of law which in these matters attaches paramount importance to domicil that, when for any reason the law of the place of domicil at death cannot be applied, the law of the domicil of origin should be held applicable. It is in the public interest that a general rule should be laid down which would be courteous and fair according to the comity prevailing between different portions of His Majesty's dominions. The judgment of the Privy Council delivered by Lord Watson in *Abd-ul-Messih* v. *Farra* (2) shews some of the consequences

(1) See notes post, pp. 827, 831. (2) (1888) 13 App. Cas. 431, 441.

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which would result if it were held that where a British subject acquires a foreign domicil, without becoming subject to the local law, he loses the rights which he had by the law of his domicil of origin. It would be a dangerous and unfair principle to introduce.

T. L. Higgins watched the case on behalf of other persons claiming to be next of kin according to Maltese law.

Upjohn, K.C., in reply.

FARWELL J. Mary Elizabeth Johnson, the testatrix, was born out of wedlock in Malta in 1810. Her father, Thomas Johnson, was a British subject and domiciled in England at the date of her birth. Her mother, Marianna Attard, was domiciled in Malta at her birth. They eventually married in 1815. The testatrix left Malta about 1832 or 1833. She made a will, which does not dispose of the whole of her property. She was at the date of her will and thenceforth down to her death on December 25, 1894, domiciled in Baden. She was not, however, naturalized in Baden; and, "according to the law of Baden, the legal succession to the property of the deceased of which she has not disposed by will is governed solely by the law of the country of which the testatrix was a subject at the time of her death." This is the finding of fact in the master's certificate; and, there being no summons to vary, is binding on all parties. On these facts the master has submitted certain questions to the Court, which really resolve themselves into this one question—according to what law are the rights of the persons claiming the undisposed of personal estate of the testatrix to be determined? This personal estate consisted entirely of personal property (movables), situate partly in Germany and partly in England. Now, the rights of the parties claiming in an English Court movables (and there is no question in this case of leaseholds or real estate) of an intestate depend on the law of his domicil at the time of his death. It is a settled principle of English law that no one shall be without a domicil. Every one takes at birth the domicil of his father, if he be legitimate, of his mother if illegitimate, and he may in later life acquire a domicil of choice. But until he

does so, or if he abandons his domicil of choice, his domicil of origin remains or revives. To quote Lord Watson (1): "Lord Westbury in *Udny* v. *Udny* (2) .... said, 'Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time.' According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend." But when I turn to the laws of Baden at the death of the testatrix, the municipal law of which, according to our law, the testatrix had attracted to herself, I find that the Courts of Baden paid no heed to domicil—she was foreign to them in birth, and had done in her lifetime no act which their Courts recognised as entitling her to be regarded as a person the succession to whose movables should be regulated by their law. According to their law the succession to her movables was regulated by the law of the country of which she was a subject at her death. (3)

Now, I do not understand that any one contends, and, if they did, it would be impossible for me to hold, that this results in a circulus inextricabilis, an unending reference from one Court to another. In my opinion the true view is this—the question having arisen in an English Court primarily falls to be decided in accordance with the law administered by that Court. That law distributes movables according to the domicil at the death; and, according to that law, every person must have a domicil somewhere or other, either of origin or of choice. When the Court has ascertained that the domicil of origin has been displaced by domicil of choice, distribution of movables follows the domicil of choice; but in order to establish a new domicil of choice, the Court has to be satisfied that

(1) 13 App. Cas. 439.

(2) L. R. 1 H. L., Sc. 458.

(3) The German Civil Code, in force since January 1, 1900, *Einführungs-Gesetz*, art. 25, has confirmed this rule for the whole of Germany: see n. (2), post, p. 831.—F. P.

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it has been adopted animo et facto—it is essential that there should be both animus and factum. When, therefore, the law of the land said to be chosen as the new domicil disregards domicil and declines to distribute in accordance therewith or to treat it as of any force, there cannot have been any change of domicil de facto; and the case is accordingly remitted to this Court as a case where the propositus has intended but has failed to obtain an effectual domicil of choice. No change is effectual unless the factum is proved, and the factum cannot exist in a country where the law refuses to recognise it. The result is that this Court must conclude that a domicil of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicil at all, and that the propositus, therefore, is left with his domicil of origin unaffected. The Baden Courts would in effect have disavowed him and disclaimed jurisdiction. This appears to me to be the logical result of the application of our rules respecting domicil and to be in accordance with justice. It is argued that the proper course is to remit the case to the Baden Courts, leaving them to say what their law would do with the movables of the propositus. But the only ground on which the question is referred to them at all is by reason of our law of domicil. When they have once rejected this, they have rejected the propositus and all claims to direct the distribution of his movables altogether—he is a mere stranger within their gates. Why, then, should this Court ask their assistance when the only ground for seeking it is repudiated by them? Take the converse case. Suppose that the Baden Courts were distributing the movables of an English subject whose domicil of birth was English but who would, according to our law, have acquired a domicil of choice in Baden. They would disregard the domicil altogether, and, if they treat the question of English law as a matter of fact, as we do, on which evidence must be adduced, they would distribute the movables in accordance with the domicil of origin of the propositus exactly as I am proposing to do in the present case. If, on the other hand, they regard it as a question of their own law and not of fact, as

M. Labbé appears to hold in regard to French law (see *Journal du Droit International Privé*, 1885, p. 5), and there is a conflict between their views and ours, I see no reason why, in distributing movables under the jurisdiction of this Court, we should surrender our own law to their views of our law in order to secure uniformity. As has been well said in an American case of *Hilton* v. *Guyot* (1), "Comity is neither matter of absolute obligation nor of mere courtesy and good will. It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." I cannot think that I should have due regard to such rights if I were to abrogate our own ordinary rules simply for the sake of securing uniformity with the views taken of those rules by another country. If the movables of the same propositus are distributed amongst different persons according as the Court directing the distribution is in England or Baden, the reason is because the two systems of law are intrinsically different, and can only be reconciled by international treaty. Story on the Conflict of Laws, s. 28, contains this apposite passage: "There is indeed great truth in the remarks which have been judicially promulgated on this subject by a learned Court. 'When so many men of great talents and learning are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far, to define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought

(1) Quoted in Minor on Conflict of Laws, p. 6.

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to be enforced, the particular nature of her legislation, her policy, and the character of her institutions; that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the Court, which decides, will prefer the laws of its own country to that of the stranger.'" (1)

But in the particular matter with which I have to deal I do not think that any great divergence must necessarily result. It is not for me to say how the Baden Courts would interpret their rule of distributing according to nationality. I venture to think that this does not and cannot mean that they regard the propositus as an Englishman, wherever his domicil of origin may have been, but that they distribute his movables in the same way that the English Courts would distribute the movables, not of any Englishman but of the particular propositus, and would, therefore, necessarily have regard to his domicil of origin. This would be in accordance with the comity of nations, inasmuch as our Courts defer to and regard their laws in distributing the movables of a native of Baden who has not acquired a domicil here, and would avoid the difficulties to which I shall have to refer further presently. The one case in which an unavoidable conflict arises appears to me to be that of a native subject of Baden who has acquired a domicil of choice in England. If and so far as this Court distributes his movables, they would be distributed according to our law; but if and so far as the Courts in Baden distributed them, they would be distributed in accordance with Baden law. I see no way to avoid this except by treaty, nor do I think that the fact that in the converse case, such as is now before me, we distribute our own subject's movables in accordance with our law, although he would have acquired a Baden domicil if it were possible, is any breach of international comity, inasmuch as we make this distribution, not in disregard of but in compliance with Baden law, which rejects the jurisdiction over the movables of the propositus that we offer it. Counsel have

(1) Mr. Justice Porter [of Louisiana] in delivering the opinion of the Court in the case of *Saul* v. *His Creditors*, (1827) 5 Martin (N.S.) 569, 595, 596 [Story's note].

been unable to refer me to any decided case on the subject, and I have been unable to find any myself, unless the *Brown-Sequard Case*, referred to in the *Journal du Droit International Privé*, 1895, vol. xxii. p. 427, which seems to be the same case as *In the Goods of Brown-Sequard* (1), is an authority, but that was only an ex parte application. The question of "renvoi" has no doubt caused great division of opinion among foreign and English jurists. *Forgo's Case*, set out at length in Mr. Sewell's book on French Law affecting British Subjects (1897), p. 46, was at one time thought to have settled the law on the point in France (see p. 66). But it has not only been attacked by MM. Labbé, Laurent, Lainé, and Tournade (see pp. 66, 75), but has not been followed in two recent cases in the Court of Appeal in Paris (p. 75). The subject is discussed by M. M. E. Bartin in *Revue de Droit International*, xxx. pp. 129 et seq., and pp. 272 et seq.; and by Herr J. Keidel in *Journal du Droit International Privé*, 1901, p. 82, with reference to art. 27 of the Introductory Act annexed to the Civil Code of the German Empire (2); and by Signor Pasquale Fiore in the same volume (at p. 424); and it was debated at the meeting of the Institut du Droit International, held at Neuchâtel in 1900 (for the resolutions

(1) (1894) 70 L. T. 811.

(2) The *Einführungs-Gesetz* is itself a kind of supplementary code, containing 218 articles. It fixes the date (Jan. 1, 1900) for the commencement of the Civil Code, and proceeds to lay down, besides temporary provisions and rules as to the bearing of the Code on imperial German legislation and that of the several German States, a number of "General Provisions" as to the extent and application of the Code, dealing in part with questions of the conflict of laws as between Germany and other countries. The first sentence of art. 25 (referred to in art. 27) is that which most directly affects a case like the present. "Where a foreigner was resident within German jurisdiction (*seinen Wohnsitz im Inlande hatte*) at the date of his death, succession to his property is governed by the laws of the State of which he was a subject at that date (*dem er zur Zeit seines Todes angehörte*)." (*Wohnsitz* must not be translated "domicil": a man may have more than one *Wohnsitz* at the same time, Civil Code, § 7.) Art. 27 declares that in any case which under art. 25 or any one of certain other articles is governed by a foreign law, if it appears that the foreign law would recognise German law as applicable, then the German Court dealing with the case is to administer German law. This appears to be intended to dispose of the vexed question of *renvoi*.—F. P.

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arrived at, see note) (1), when there was a remarkable divergence of expert opinion. (See note to p. 424 of the same volume.)

I have given these treatises the best consideration that I can, but I cannot find any sure basis of authority on which to found any conclusion, and I gather that the disputants are urging their views of what ought to be, rather than stating their opinions of what is the law: that is certainly the effect of the resolution at Neuchâtel. It was urged in argument that the finding in the certificate is that, according to the law of Baden, movables are to be distributed according to the nationality of the propositus. I have already given my reasons for holding that the Baden Courts would have really refused jurisdiction; but, even if this were not so, I should arrive at the same conclusion in a different way. When it is said that the Baden Courts regard the nationality of the propositus, I apprehend that this means that they distribute according to the law of the nation to which the propositus belongs, or, in other words, of which he is a subject. But the British Empire consists of a large number of States, countries, and colonies, and differs from Continental nations in that it does not impose its own laws wherever its sway extends, but admits many different systems of law within its bounds. There is no one uniform law of this Empire which can be taken for this purpose as the law of the nationality of the propositus. To what nationality, then, does the propositus belong, or of whom is he a subject? The only possible answer appears to me to be that he is a subject of the British Crown, and that his nationality is the British Empire; but inasmuch as there is no one law of the Empire to which the rule in question can refer, resort must be had to the law of England. The first proposition seems to be clear. Whether born in England, Scotland, Canada, Cape Colony, or the Channel Islands or elsewhere within the Empire, he is a natural-born subject of the Crown, and, as

(1) "Sur la question du Renvoi l'Institut a adopté, sous réserve d'une rédaction nouvelle, la résolution suivante:

"Quand la loi d'un État règle un conflit de lois en matière de droit privé, il est désirable qu'elle désigne la disposition même qui doit être appliquée à chaque espèce et non la disposition étrangère sur le conflit dont il s'agit." See *Journal du Droit International Privé*, 1901, p. 1052; see also L. Q. R. xvi. 333, xvii. 11.

Calvin's Case (1) shews, the Crown is one and indivisible, and cannot be severed into as many distinct kingships as there are kingdoms; and, even if it could, how is it possible to determine what is a distinct kingdom? Even if India or some of our great Colonies could lay some claim to be so considered, how could the Isle of Man, or, indeed, Scotland, since the Act of Union? But to admit that either of these latter must be treated as one with England would let in all the inconveniences which have been pointed out in argument, and would, moreover, create an extraordinary anomaly. I base my decision on principle and on considerations of policy and convenience. "Allegiance is the tie or ligament which binds the subject to the King in return for that protection which the King affords the subject": 1 Blackst. 354. As is said in *Calvin's Case* (2), "Protectio trahit subjectionem et subjectio protectionem." It is admitted that it is the same thing for this purpose to say that the propositus is the subject of X., as to say that he belongs to the nationality of X. I see no way in which the propositus can claim to belong to a separate part of the King's dominions or to a separate nationality without denying allegiance to the King as supreme over the whole Empire as one Empire. The point appears to me to be involved in, and to be decided by, *Calvin's Case.* (2) Although there were at that time—James I.'s reign—two distinct kingdoms of England and Scotland, each with its own code of laws, it was resolved by the Lord Chancellor and twelve judges that there was but one allegiance to one King, and therefore that a Scottish-born subject of the King was no alien in England. To quote the resolution at 10 a of the report: "Ligeantia naturalis nullis claustris coercetur, nullis metis refrænatur, nullis finibus premitur." And consistently with this we find that when the East India Company was abolished by 21 & 22 Vict. c. 106, it was enacted (s. 2): "India shall be governed by and in the name of Her Majesty." So, too, the sanction, either express or implied, of the Crown, is required for the validity of the Acts of all colonial legislatures: Dicey on the Law of the Constitution, 3rd ed. p. 98.

(1) 7 Rep. *27 b; 2 How. St. Tr. 559.

(2) 7 Rep. *5 a.

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Turning from principle to policy and convenience, how is the foreign Court to ascertain what law of what part of the British Empire is to apply? Foreign States are in diplomatic relation with this country as representing the whole Empire. They know nothing officially of Scotland or Canada, or the Colonies, still less, perhaps, of the Channel Islands or the Isle of Man. It would surely be a task of difficulty and delicacy for them to discriminate and determine judicially that Canada, for instance, or the Cape is a distinct nationality. Indeed, in some circumstances and in some states of public feeling, such a determination might come perilously near to an unfriendly act. Further, unless a novel and hitherto unheard-of definition of nationality is adopted, whereby every country within the Empire that has a distinct set of laws is treated as a separate nationality (an impossible course, in my opinion), the foreign Court has no data to guide it in determining what is a nationality. Does it depend on area, or population, or wealth? And how is any uniformity of opinion on the point, amongst foreign Courts, to be secured? Again, what nationality at his death can a Court which ignores domicil attribute to a man born in Scotland who makes his home and fortune at the Cape and dies in England? These are practical difficulties which appear to me overwhelming. Further, the object aimed at would not be attained, at any rate, in the very case put forward in argument—namely, of Scotland. It was said to be hard on a Scotsman that his estate should be dealt with under English law. But whatever might be said of some of the Colonies, I fail to see how any Court could hold that Scotland is a distinct nationality in the face of the Act of Union (6 Anne, c. 11, s. 1): "That the two kingdoms of England and Scotland shall be upon the first day of May, 1707, and for ever after be united into one kingdom." So the Isle of Man, though retaining its own laws, was purchased in the reign of George III., and by the Act 5 Geo. 3, c. 26, was inalienably vested in His Majesty and his heirs and successors. Indeed, I incline to think that the only part of the British Empire which could with any plausibility claim to be regarded as a separate nationality—if

allegiance to the Crown would permit it—is the Channel Islands, being part and parcel of the Duchy of Normandy and described in *Calvin's Case* (1) as, "no parcel of the Realm of England but several dominions enjoyed by several titles, governed by several laws." The only possible solution appears to me to be that foreign Courts must necessarily refer such questions as these to and decide them according to the law of the country with which alone they are in diplomatic relation; and inasmuch as the law of England distributes such movables in accordance with domicil of origin, substantial justice is done to all His Majesty's subjects, and the born Scotsman will not, any more than the Cape of Good Hope colonist or Jerseyman, be deemed to have become an Englishman or to have given up that domicil of origin with its attendant laws to which, according to counsel's argument, he is so deeply attached, although in the particular case he had done all that in him lay to change it for another. I conclude, therefore, that distribution according to the law of the nationality means according to English law, but according to that law as applicable to the particular propositus, and not to Englishmen generally without regard to their domicil of origin. The testatrix in this case is found by the certificate to have been born a subject of the British Crown and to have had her domicil of origin in Malta. Her movables, therefore, will be distributed amongst the persons who would be entitled thereto according to Maltese law.

Solicitors: *Hickson & Moir; S. W. Johnson & Son, for Adamson & Adamson, North Shields; Solicitor to the Treasury.*

(1) 7 Rep. *21 a.

J. R. B.

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March 11, 12.

BOYCE *v.* EDBROOKE.

[1902 B. 580.]

Powers—Lease—Validity—Lease to Donee of Power and his Partners—Statutory Requirements—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38)—*Covenants—Lease to Trustee for Donee of Power.*

A lease granted, in exercise of statutory powers to lease, by a tenant for life to himself and others as lessees containing covenants by the lessees with the lessor is bad, whether the covenants are joint only or joint and several, because the reversioners do not in either case obtain binding legal covenants by all the lessees upon which an action can be brought. Only binding legal covenants will satisfy the requirements of the statutes.

Semble, a lease granted by the donee of a power to a trustee for himself would not now be held valid.

Bevan v. *Habgood*, (1860) 1 J. & H. 222, discussed and questioned.

Henry Boyce, the testator in this action, who died on May 11, 1877, by his will devised a mineral water manufactory and two messuages adjoining thereto in Meadow Street, Bristol, of which he was seised in fee, to his son, Frederick Boyce the elder, for his life, and after his decease to his children, if more than one, as tenants in common in fee. The two messuages were afterwards used as one, and the whole of the premises became known as No. 12, Meadow Street.

Frederick Boyce the elder had eight children living at the testator's death or born afterwards.

At the time of the testator's death he was carrying on the business of a soda water manufacturer on the premises. This business was carried on after his death by Frederick Boyce and another son of the testator; but before the year 1892 Frederick Boyce had acquired his brother's interest, and in that year he took his son, the plaintiff Henry Boyce, and William Martin Goldsworthy into partnership to carry on the business under the name of Boyce, Son & Co.

By an indenture of lease dated May 9, 1892, and made between Frederick Boyce the elder (thereinafter referred to as the lessor) of the one part, and the said Frederick Boyce, Henry Boyce, and William Martin Goldsworthy, trading under the

style or firm of Boyce, Son & Co. (and thereinafter referred to as the lessees), of the other part, in consideration of the rent thereinafter reserved and of the lessees' covenants thereinafter contained, the lessor, in exercise of the power given to him by the Settled Estates Act, 1877, or of any other power in any way enabling him in that behalf, demised unto the lessees the dwelling-house, factory, and premises known as No. 12, Meadow Street, Bristol, at the yearly rent of 60*l.* 10*s.*, payable quarterly, and the lessees thereby covenanted with the lessor in manner following: (then followed the usual covenants to pay rent, keep the premises in repair, paint as therein mentioned, and insure; a proviso for re-entry if the rent were twenty-eight days in arrear, and a covenant by the lessor for quiet enjoyment). And it was thereby declared that the expression "lessor" should include the person or persons from time to time entitled to the reversion of the premises thereby demised expectant on the term thereby granted, and the expression "lessees" should include their executors, administrators, and assigns where the context so permitted.

At the date of the lease Frederick Boyce's life interest was mortgaged to a building society for 500*l.*, and the yearly instalments payable under that mortgage amounted exactly to 60*l.* 10*s.* a year. The building society consented to the lease.

When Frederick Boyce the elder agreed to grant the said lease it was agreed between him and his partners that he should be at liberty to reside rent free in the house No. 12, Meadow Street, and that when he ceased to reside there he should receive 16*l.* a year as rent for the said house; he did reside in the house rent free for a time under this arrangement, and afterwards, for a time at least, received the 16*l.* a year.

In 1893 all the interests of the plaintiff Henry Boyce and Frederick Boyce the elder were assigned to William Martin Goldsworthy. William Martin Goldsworthy died in 1898, and his executors sold and assigned the leasehold premises to Charles Edward Beavis, who in 1900 assigned them for value to Robert Edbrooke, the defendant in this action.

The mortgage to the building society was paid off in 1893, and the usual statutory receipt indorsed.

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Frederick Boyce the elder died on February 11, 1902. This action was brought by his children and his executors, claiming possession of the premises comprised in the said lease.

The Settled Estates Act, 1877, s. 46, requires that by every demise made thereunder by a tenant for life "the best rent that can reasonably be obtained be reserved," and that such demise do contain a covenant for payment of rent and such other usual and proper covenants as the lessor shall think fit. The Settled Land Act, 1882, s. 7, sub-ss. 2, 3, also requires the best rent and a covenant to pay rent.

Upjohn, K.C., and *F. Thompson*, for the plaintiffs. It is clear on general principles that a tenant for life cannot grant a lease to himself under a statutory power. It was held in *In re Skeats' Settlement* (1) that the donee of a power to appoint new trustees cannot appoint himself, because the power is fiduciary, and a man cannot be an impartial judge in his own case of the points to be considered. The donee of a power of sale clearly cannot sell to himself, whether he be trustee or mortgagee: *Farrar* v. *Farrar's, Limited* (2); or tenant for life: *Grover* v. *Hugell.* (3) In *Howard* v. *Ducane* (4) it was held that trustees who had a power of sale with the consent of the tenant for life might sell to the tenant for life; but that is only an apparent exception to the general rule, for the tenant for life was not donee of the power. The case of a power to lease is stronger than either a power to appoint new trustees or a power of sale. In granting a lease it is not sufficient to consider the amount of the rent, as appears from the cases which decide that the mere fact that 20*l.* more rent could be obtained is not conclusive that a lease was granted at an undervalue.

It is said to be established that the donee of a power can grant a lease under the power to a trustee for himself. That is stated by Lord Hatherley, when Vice-Chancellor, in *Bevan* v. *Habgood* (5) and in Sugden on Powers, 8th ed. p. 717, but it

(1) (1889) 42 Ch. D. 522.
(2) (1888) 40 Ch. D. 395, 409.
(3) (1827) 3 Russ. 428; 27 R. R. 103.
(4) (1823) T. & R. 81; 23 R. R. 190.
(5) 1 J. & H. 222.

depends only on the cases of *Wilson* v. *Sewell* (1), *Earl of Cardigan* v. *Montague* (2), and *Taylor* v. *Horde*. (3) In *Earl of Cardigan* v. *Montague* (2) a tenant for life had granted leases to a trustee for himself, but the decision was on a master's report, to which exceptions were taken on other points, and this point does not seem to have been argued or decided. In *Wilson* v. *Sewell* (1) it appears from the report in Blackstone that the power was given by an Act of Charles II., and that the case was decided on the practice under it. *Taylor* v. *Horde* (3) does seem to lay down the rule, but subject to a proviso, "that the trustee is properly bound," which prevents it applying to this case. But even if those cases are to be followed the case is bad on other grounds. The lease purports to be made under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and s. 46 of that Act requires that every lease shall contain a covenant for payment of rent, and the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7, sub-s. 3, contains the same provision. The requirements of the Settled Estates Act were discussed in *Davies* v. *Davies*. (4) But in this case the only covenant is by the lessor and others with himself; that is no covenant at all: *Neale* v. *Turton* (5); Leake on Contracts, 1878 ed. p. 439. If there be any covenant at all it is only a joint covenant, and *Kendall* v. *Hamilton* (6) shews that, notwithstanding the Rules of the Supreme Court, Order XVI., r. 11, all the covenantors in a joint covenant must be made parties to an action. The lessor would, therefore, have to bring an action against himself.

Again, the lease is bad because the tenant for life took a benefit for himself. The rule is laid down by Lord Eldon in *The Queensberry Leases*, *Montgomery* v. *Charteris* (7): "If he has got more for himself than for others, that is decisive evidence against him"; and *Chandler* v. *Bradley* (8) shews that if he takes any benefit it is not necessary to prove that the beneficiaries in remainder have suffered any loss. Here

(1) (1766) 4 Burr. 1975; 1 W. Bl. 617.
(2) (1754) Sugden on Powers, 8th ed. App. 918.
(3) (1757) 1 Burr. 60, 122.
(4) (1888) 38 Ch. D. 499.
(5) (1827) 4 Bing. 149; 29 R. R. 531.
(6) (1879) 4 App. Cas. 504.
(7) (1817) 5 Dow, 293, 344.
(8) [1897] 1 Ch. 315.

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the lessor got a right to reside in the demised premises, and an annual payment instead when he ceased to reside. The lease under the power is absolutely void, not voidable; so the defence of purchase for value without notice is not available. Neither of the Acts contains a clause making a lease valid in favour of a bonâ fide purchaser, such as was held to protect him from the duty of seeing that the tenant for life had given notice to the trustees in *Mogridge* v. *Clapp*. (1)

Butcher, K.C., and *W. G. Clay* (*H. Holman Gregory* with them), for the defendant. On the facts no benefit was reserved to the lessor personally by the lease; the arrangement as to residence was merely part of the plaintiff's arrangements: it had nothing to do with the lease.

As to the objection that the lessor was one of the lessees, the rule laid down in *Bevan* v. *Habgood* (2) is adopted by all the text-books, and the case has been quoted again and again, but never in any way disapproved. In *Wilson* v. *Sewell* (3) all the leases were granted to a trustee for the lessor. The fact that only some were declared void, and those on special grounds, makes it a clear authority that their being granted to the trustee was not a fatal objection. The cases quoted in *Bevan* v. *Habgood* (2) have been closely criticised, but none of the text-writers have had any doubt what they meant: see Sugden on Powers, 8th ed. p. 718; Woodfall's Landlord and Tenant, 17th ed. p. 228. If a lease to a trustee for the lessor under which he takes the whole beneficial interest is good, a lease to a partnership, of which he is a member and takes only a share in the beneficial interest, cannot be bad. As to the question of covenant; since the Judicature Act an action can be brought on a contract between a firm and one of its members: Lindley on Partnership, 6th ed. p. 276; Rules of Supreme Court, Order XLVIII A, r. 10.

The old plea in abatement is abolished, and the Court has a discretion whether it will require all joint contractors to be joined in an action: *Wilson, Sons & Co.* v. *Balcarres Brook SS. Co.* (4)

It is always a matter of construction whether a covenant is

(1) [1892] 3 Ch. 382.
(2) 1 J. & H. 222.
(3) 4 Burr. 1975.
(4) [1893] 1 Q. B. 422.

joint or joint and several. The Court will look at the interests which it is intended to protect: *Palmer* v. *Mallet*. (1) This covenant must be construed as joint and several, and if so is good: *Rose* v. *Poulton* (2); *Midland Ry. Co.* v. *Taylor*. (3) In any case, after the death of Frederick Boyce the other lessees could be sued.

FARWELL J. The plaintiffs sue as the reversioners expectant on the determination of the life interest of a tenant for life who died in 1902, claiming under a will dated in 1877. The tenant for life purported to grant a lease on May 9, 1892, pursuant to the powers vested in him by the Settled Estates Act, 1877, and any other power he might have. [His Lordship went through the evidence, and decided upon the facts that the lessor had retained a special advantage for himself, and had never considered the question of best rent, but merely stipulated that his mortgage interest should be paid, and proceeded :—]

The second point is this; the Act of Parliament requires "that such a demise do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit." Now the lease is by the tenant for life to himself and two others. It is argued that the covenants are joint and several. I have done my best to spell a several liability out of the document, but I am wholly unable to do so, and I do not think the Court is at liberty to alter the plain words. If there is an ambiguity, no doubt the Court will lean to the side which will give effect to the transaction and set it up rather than invalidate it, but here the demise is to the lessees, and the covenant is, "And the lessees hereby covenant with the lessor." The word "lessees" without more occurs throughout, and the definition clause states that "the expression lessee shall include their executors, administrators, and assigns," not "and the administrators, executors, and assigns of each of them," which would be the common form of a joint and several covenant. I do not feel at liberty to alter the words of this deed so as to give effect to an intention which I can find nowhere

(1) (1887) 36 Ch. D. 411. (2) (1831) 2 B. & Ad. 822; 36 R. R. 761
(3) (1862) 8 H. L. C. 751.

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expressed in the document. Now when the Act of Parliament mentions "covenant" it means a legal covenant which can be sued upon at law, and not some right which might, or might not, arise from equitable considerations; but if this is a joint covenant, no action could have been brought upon it at law, at any rate while the lessor lived. As was said by Best C.J. in *Neale* v. *Turton* (1): "There is no principle by which a man can be at the same time plaintiff and defendant." But perhaps the most instructive case on the point is *Mainwaring* v. *Newman* (2), where Lord Eldon points out the distinction between a plea in abatement arising from non-joinder of a party, and the absence of any contract at all, owing to the same person being plaintiff and defendant. The case was this: A man of the name of Brander made a promissory note to three persons, namely, Newman, himself, Brander, and Thomas Chatteris. These three indorsed the note to the three plaintiffs, W. Mainwaring, G. B. Mainwaring, and the same Thomas Chatteris. The plaintiffs brought assumpsit against Newman on the note. The defendant put in a plea in bar that Thomas Chatteris, who was one of the plaintiffs, was liable together with the defendants as indorser, and that this liability was joint, not several. Lord Eldon, then Chief Justice, says: "The present opinion of the Court is, that the defendant must have judgment. Indeed it appears to me that the subject of the present plea could not have been pleaded in abatement; because a plea in abatement ought to give a better writ, not to shew that the plaintiff can have no action at all." It is plain, therefore, that there is no contract at all which can be sued upon at law when one of the contracting parties covenants with himself and others jointly. It is obvious, of course, there can be none between a man and himself alone. Then it is said that at any rate after the death of Frederick Boyce the other two lessees could be sued, and a case has been cited (3) as an authority for this. But, assuming the survivors could be sued, it does not help the defendant, and for this reason. There are three lessees,

(1) 4 Bing. 149, 151; 29 R. R. 531.
(2) (1800) 2 Bos. & P. 120, 125; 5 R. R. 554.
(3) *Rose* v. *Poulton*, 2 B. & Ad. 822; 36 R. R. 761.

and the covenant must bind all three of them. If the other two lessees survived Frederick Boyce, as has in fact happened, I will assume that they could then be sued; but if Frederick Boyce were the survivor, no action would lie against himself, and the whole covenants would fail. The reversioners are entitled to have proper covenants enforceable from the commencement of the lease against all the three lessees.

The last point upon which I think something turns is the definition clause at the end of the lease: "And it is hereby declared that the expression lessor shall include the person or persons from time to time entitled to the reversion of the premises hereby demised expectant on the term hereby granted, and the expression lessee shall include their executors, administrators, and assigns, where the context so permits." I think the true meaning of that is that "lessor" means the person entitled to the reversion immediately expectant on the term, because, as Mr. Upjohn has pointed out, the covenant is with the lessor, and I could not read this definition clause so as to enable any of the persons entitled in remainder to sue on these covenants during the lifetime of the tenant for life. It really only gives effect to the provision in the Act, that the rents and covenants are to be incident to the reversion. Therefore, as far as I can see, that does not help the defendant at all.

Then there only remains the last point, which is one of very considerable interest. If there is one doctrine better settled than another in a Court of Equity it is that a man shall not put himself in such a position that his interest conflicts with his duty. A man cannot be both buyer and seller, or lessor and lessee. Now to that principle there is said to be one exception, that, under powers of leasing, the donee of the power can lease to a trustee for himself. Assume that is so. It is a perfect anomaly. It is an exception which owes its existence to authority, and not, with all respect, to common sense. There is no possible ground for it that I can see, and I should decline to extend it one hair's breadth. But it is clear to my mind that there is no authority, and no ground for saying, that the donee of a power of leasing could lease to

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himself, either alone or jointly with others, without the interposition of a trustee. Assume for a moment that he can lease to a trustee; that must be because you get a perfectly good contract at law, with covenants at law which can be sued upon and recovered on; and it may be that the fact that the trustee has a right to indemnity over against the lessor may be disregarded. However that may be, there is no authority to shew that the donee with a power of leasing can lease to himself, and I am clearly of opinion that he cannot.

Further, I ought to say that I feel very considerable doubt whether there is any such exception in equity as is stated. No doubt the exception is stated in some of the text-books, and appears to have been stated (which is the most important of all) by Page Wood V.-C. in *Bevan* v. *Habgood.* (1) The Vice-Chancellor certainly does say there: "In this particular class of cases the Court does not hold by its general doctrine, which prohibits an agent from contracting for his own benefit as against his principal." The only authorities the Vice-Chancellor relies upon, all of which have been cited to me, are Sugden on Powers, 8th ed. p. 717, *Wilson* v. *Sewell* (2), and *Earl of Cardigan* v. *Montague.* (3) With regard to *Earl of Cardigan* v. *Montague* (3), so far as I can see this question never arose at all. In that case the defendants prayed an inquiry as to the quantum of the rent, &c., before they were put to their election, and hoped that the Court would first determine the validity or invalidity of the leases; and it was thereupon referred to the master to look into the several leases and to inquire into the powers of the lessor and to state his opinion thereon. The master's report relates to twenty-four leases, and is divided into eight heads: he reported several leases to be valid and several to be invalid for the various reasons stated in his report; but there is not one word from beginning to end to shew that any question was ever raised on the fact, which only appears incidentally in the third line of the report: "That the Duke of Montague, under a power contained in his marriage settlement, executed leases to the defendant Edward Montague,

(1) 1 J. & H. 222, 229.
(2) 4 Burr. 1975.
(3) Sugden on Powers, 8th ed. App. 918.

who executed declarations of trust, declaring such leases to be made in trust for the Duke." Lord St. Leonards italicizes those words in the power which appear to him material on p. 919. The case is referred to several times in the text on the points to which these words relate; and also at p. 717 with *Wilson* v. *Sewell* (1) and *Taylor* v. *Horde* (2), but without any statement shewing how it is relevant.

I cannot treat a decision of the Lord Chancellor in 1754, on the question whether the leases were good or bad, according to the report of the master, as deciding by a side wind, and inferentially, a point which was not raised or suggested in contravention of, I believe, a well-settled rule of equity. To my mind the case has no bearing on the subject at all. Moreover, the case itself is reported to some extent in the report of *Taylor* v. *Horde*. (2) There it is referred to as a decision on the question whether covenants were equivalent to "boons." This particular point is not mentioned at all, nor can I discover that it has ever been referred to in any other case as an authority on this point.

The case of *Taylor* v. *Horde* (2) does contain this statement (3): "It is no objection to a lease under a power 'that it is in trust for him who executes the power,' provided the legal tenant be bound, during the term, in all requisite covenants and conditions." That is a statement in the judgment of a Court of common law, which, in those days, 1757, certainly did not regard equitable considerations at all. Assuming that it does decide that proposition and is not a mere dictum, it would be merely a decision that it was a perfectly good lease at law, and I do not see, as at present advised, why it was not. If you had a lessor and lessee, and proper covenants so far as common law was concerned, it was. What had the common law which disregarded trusts to do with the persons for whom the lessee was trustee? It appears to me that all that was intended to be laid down was that it was a good lease at law, so that the first ground on which I have decided the present case would not be open to the person objecting as against a

(1) 4 Burr. 1975. (2) 1 Burr. 60, 122.
(3) 1 Burr. 124.

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purchaser for value without notice of the trust. That seems to be all that was laid down there, and I think that this is what Lord St. Leonards means by italicizing the words "the legal tenant" at p. 717 of Sugden on Powers.

The other case is *Wilson* v. *Sewell*. (1) It is reported twice, but it is usually cited from Burrow's report, which states it thus: "Its being in trust for himself was no objection. It makes no difference, with regard to the successor: he will receive the accustomed rent; and if the lease is in all other respects regular, it signifies nothing to the successor, whether one person or another gets the beneficial profit upon it." Now, with all respect to the reporter, if the report in Blackstone is accurate, as I am disposed to think it is, that entirely misrepresents what the Court decided, and makes them give a reason which is no reason at all. The power was not to let at the accustomed rent; but at the rent which had been usually received during the greater part of the preceding seven years *or more*, and it therefore signified a good deal to the successor. From the report of the case in W. Blackstone it is plain that the decision turned on different considerations altogether. The power was a power of leasing under a private Act of Parliament of the 12th year of Charles II., giving the Master of the Rolls for the time being power to lease certain premises in Rolls Yard. The Master of the Rolls, Sir Thomas Clarke, had granted a lease to a trustee for himself. When the case came on for argument, Lord Mansfield said (2): "How was the original cotemporary exposition of this law? Mr. Verney's, I know, were in trust. I remember, on the death of Sir J. Jekyll, a dispute arose between his representatives and Mr. Verney." Then, as shewing what was in his mind when he comes to give judgment, he says (3): "It is objected first; that letting it to trustees for the lessor is a fraud upon the power. That is a question merely between the parties. It is just the same thing as betwixt the lessor and the successor. The practice of the office for 100 years accordingly is a sufficient justification." Now it appears to me the real meaning

(1) 4 Burr. 1979; 1 W. Bl. 620. (2) 1 W. Bl. 620.
(3) 1 W. Bl. 624.

of that decision is that the fact that the statute was passed as long ago as the 12th year of Charles II., and that there had been a uniform granting of leases by every Master of the Rolls since to a trustee for himself, shewed that was the true meaning of the Act, and that is the true conclusion to which Lord Mansfield came; if so, it is no authority for any general proposition. Mr. Chance states the case as an illustration of this principle: "It is a very common practice for bishops and ecclesiastical persons to make leases of their possessions to others in trust for themselves: the main thing required by the statutes is that the ancient rent shall be reserved; there is no discretion reposed in the lessors; provided the conditions of the statutes are attended to it is a matter of much indifference to the successor who is the lessee": Chance on Powers, vol. ii. p. 230. He therefore adopts the report in Burrow, but he does not state it as establishing any general proposition that the donee of a leasing power can lease to a trustee for himself except where the rent is fixed by the document creating the power and there is no discretion to exercise. The real difficulty, if I had to decide the question of a grant of a lease to a trustee, would be the statement of Wood V.-C. I have made these observations because I think it is decidedly unsafe for any one now, relying upon that statement of the Vice-Chancellor, to grant a lease to a trustee for himself, or for any one to accept the assignment of a lease granted to a trustee for a tenant for life, on the assumption that the Courts would hold themselves bound by the statement of the Vice-Chancellor, or by the instances given in support of an exception, which, when examined, do not establish its existence, especially as the exception is from one of the most elementary and salutary doctrines of this Court, that a man shall not put himself in a position where his interest conflicts with his duty. On these grounds it appears to me the lease is absolutely bad.

Solicitors: *George F. Sutton, for Page & Thompson, Bristol; Bisgood, for E. J. Pillers, Bristol.*

J. R. B.

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March 12.

In re WELLS.
BOYER *v.* MACLEAN.

[1900 W. 4103.]

Trust—Administration—Infants—Arrangement altering Trust Property for Benefit of Infants—Compromise—Jurisdiction of Court to approve.

Henry Wells, who died in 1883, gave his residuary estate to trustees upon trust, to pay certain annuities to his two daughters and other persons for their lives, and, after the death of the last surviving annuitant, for such of the children of his two daughters as should be then living and should attain twenty-one or marry.

In 1902 the two daughters, their surviving children, and all other parties interested under the will, executed a deed whereby, subject to the approval of the Court, it was agreed that the trusts of the will should be put an end to, and instead thereof the trustees should hold the property upon trust to purchase Government annuities for the annuitants, and pay the residue to the children then living or the trustees of those who had settled their shares, making their interests absolute instead of contingent. Two of the children had executed settlements under which infants were or might become interested:—

Held, that the Court had jurisdiction to approve the scheme on behalf of the infants.

Peto v. *Gardner*, (1843) 2 Y. & C. Ch. 312; 60 R. R. 165, and *Day* v. *Day*, (1845) 9 Jur. 785, not followed.

HENRY WELLS, the testator in this action, by his will dated December 15, 1882, after giving certain pecuniary legacies, gave all the residue of his estate to trustees upon trust for sale and conversion, and after payment of debts, &c., to invest and stand possessed of the investments and the income thereof upon trust to pay annuities of 4*l.* a week each to his daughters Jane Maclean and Betsy Newman during their respective lives, certain annuities to four other persons, who were dead at the date of these proceedings, and an annuity of 10*s.* a week to George Hill, who was still living, and to hold the residue of the corpus and income of the residuary estate upon trust for such one or more of the children of his said daughters, including three illegitimate children of his daughter Betsy Newman, as should be living at the death of the survivor of all the said annuitants, and being male should attain the age of twenty-one years, or being female marry under it. The

testator died on December 31, 1882, and his will was proved on January 27, 1883.

There were nine children of the testator's daughters living at his death, all then infants. They were maintained and educated by the trustees with moneys advanced under a power contained in the will. At the date of these proceedings seven children only survived, namely, one married and two unmarried daughters of Betsy Newman, and three daughters and a son of Jane Maclean, all of whom were married. Settlements had been made on the marriages of all the married daughters giving them life interests restrained from anticipation, but giving no interests to the children of the marriages.

Edith Newman, one of the unmarried daughters of Betsy Newman, had by a voluntary settlement dated October 5, 1896, assigned her share upon trust for herself for life, with remainder, if she should so appoint, to any husband who might survive her, and subject thereto in trust for her children as therein mentioned.

Andrew Maclean, the son of Jane Maclean, had by an indenture dated April 3, 1902, assigned his share of the said residue to trustees upon trust, subject to a mortgage therein mentioned, to pay the existing and future debts of the said Andrew Maclean, and subject thereto to pay the income to him for his life, and then to his wife for life, with remainder to his children.

The testator's two daughters, Jane Maclean and Betsy Newman, were fifty-eight and fifty-seven years of age respectively, and deemed to be past child-bearing; they were also his heiresses-at-law and next of kin. Jane Maclean had assigned her annuity to the Scottish Metropolitan Life Assurance Company, and Betsy Newman had assigned hers to the Norwich Union Life Assurance Society.

By an indenture dated November 19, 1902, to which all the persons interested were parties, it was agreed, subject to the approval of the Court, that the trusts of the will should be put an end to, and that the interests of the children of the testator's daughters in his residuary estate should no longer be contingent upon their surviving the annuitants, but should be

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absolute and indefeasible, that all the testator's property should be realized, and, after payment of costs and purchase of a Government annuity for George Hill, the only surviving annuitant other than the testator's daughters, and payment of agreed sums to the insurance societies in discharge of the daughters' annuities, an annuity of 30*s.* a week should be purchased for each of the testator's daughters in lieu of an allowance of that amount, which had been paid to them under an order of the Court, and the residue should be paid, after deducting moneys spent for advancement, to the surviving children, or the trustees of their respective settlements.

This was a summons to obtain the approval of the Court to this arrangement on behalf of the infants interested, and an order binding the interests of the married women who were restrained from anticipation.

In order to remove difficulties, it was agreed that Edith Newman should release her power of appointing to a husband, so far only as might be necessary to prevent his questioning the arrangement, and should exercise her power of appointment in default of issue by appointing absolutely to herself, and should insure her life for one-seventh of the amount spent in purchasing annuities for the annuitants and assign the policy to the trustees of her settlement, who should be at liberty to pay the premiums out of the income of the settled property.

It was also agreed that Andrew Maclean should undertake to incur no more debts after March 12, 1903, and that the trust in his settlement for payment of debts should apply only to debts due at that date.

Butcher, K.C., and *T. A. Nash*, for the plaintiffs, the trustees of the will. The Court has jurisdiction to approve the scheme on the part of the infants. That was stated in the widest possible terms by Turner L.J.: *Brooke* v. *Lord Mostyn*. (1) In *Nunn* v. *Hancock* (2) the Court of Appeal forced on a purchaser a title which depended on the jurisdiction of the Court to sanction the sale of an infant's reversion. In *Peto* v. *Gardner* (3)

(1) (1864) 2 D. J. & S. 373, 415.
(2) (1871) L. R. 6 Ch. 850.
(3) 2 Y. & C. Ch. 312; 60 R. R. 165.

Knight-Bruce V.-C. refused a similar application on the ground that he had no jurisdiction, and he followed and approved his own decision in *Day* v. *Day* (1); but we submit that those cases are contrary to the general current of authority. In a quite recent case before the Court of Appeal in camerâ it was held that the Court's jurisdiction to sanction an arrangement of this kind was not limited to cases of compromise. [The summons was ordered to stand over in order that the decision in this case might be laid before the judge. The case is stated in the judgment.]

March 12. *Butcher, K.C.*, and *T. A. Nash.* The judgment of Romer L.J. in *In re New* (2) is clear as to the jurisdiction.

Upjohn, K.C., and *W. F. Webster*, for all the children of the testator's daughters except Edith Newman;

Elgood, for Edith Newman;

A. F. C. C. Luxmoore, for the infant child of Andrew Maclean;

V. Taubman-Goldie, for the Scottish Metropolitan Life Assurance Company;

A. M. Begg, for the Norwich Union Life Assurance Society;

F. J. Forder Lampard, for the annuitant G. Hill;

W. Scott Thompson, for the testator's co-heiresses and next of kin;

all supported the application.

FARWELL J., after stating the facts of the case, proceeded:—The only question which causes me any difficulty is the question of jurisdiction. The arrangement, so far as Andrew's share is concerned, appears to me to be obviously for the infant's benefit, for he gets the certainty of 2000*l.* and upwards instead of the contingent reversionary chance of a sum which in all probability would amount to nothing at all.

As regards Edith there is more difficulty, because the interests of the annuitants and the testator's co-heiresses and the statutory next of kin, who would take in the event of none of the seven children surviving, are being bought up out of corpus; but inasmuch as Edith is willing to insure her life for an amount sufficient to replace the sum so paid so far as

(1) 9 Jur. 785. (2) [1901] 2 Ch. 534.

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attributable to her share, and to have the premiums payable made a first charge on the income of the money which is coming to her, that difficulty, I think, is obviated. Have I then jurisdiction? I should have thought it plain if it had not been for the decisions of Knight Bruce V.-C. in *Peto* v. *Gardner* (1) and *Day* v. *Day*. (2) Referring to the older cases, I find *Inwood* v. *Twyne* (3), where the Lord Chancellor deals with the question of an infant's personal estate which had been expended in purchase of a jointure charged on her real estate: "The question is, Whether the jointure estate shall go to the real or personal representative? It was said that the nature of an infant's estate cannot be changed. This is a matter of consequence, and if there was any such rule laid down by the Court, I would acquiesce in it; but in my opinion it is otherwise: the Court has often changed it for the convenience of the infant. Guardians and trustees may change the nature of infants' estates, under particular circumstances; and the Court would support their conduct, if the Court would do it under the same circumstances. They cannot do it wantonly, but where it is manifestly for the convenience of the infant. The Court keeps a strict hand over them, to prevent partiality. But it is too hard to say, that the Court would not permit trustees or guardians to do it in any case where it is manifestly for the advantage or convenience of the infant. The Court has done it in many cases, in making compositions, and often contrary to the direction of the donor or testator; as where money is directed to be laid out in freehold land, the Court has, for conveniency, ordered part to be laid out in leasehold. The Court has no more right to change the nature of the infant's estate than trustees or guardians have. If the Court can do it in any case, the present is the most reasonable for the purpose. The family thought it convenient to purchase, and add to the real estate of the infant, or rather to annihilate this jointure interest. It was very advantageous to her, and her estate of inheritance. It would not have been reasonable to consider it as personal."

(1) 2 Y. & C. Ch. 312; 60 R. R. 165. (2) 9 Jur. 785.
(3) (1762) Amb. 417, 419.

To the same effect is the case of *Pierson* v. *Shore*. (1) The question there was whether a new lease for lives taken by a guardian on behalf of an infant in place of a lease for lives to which she was entitled under her mother's will descended to the heirs of the infant ex parte paternâ or ex parte maternâ. Lord Hardwicke held that it was a new acquisition properly made by the guardian, and must go to the heirs ex parte paternâ, and said: "Here one life being dead, surrendering the old, and taking a new lease, was the most beneficial purchase for the infant that could be, and therefore ought to have the same consequence as if done by the infant herself at full age, and go to the heirs ex parte paternâ." (2)

That seems to me to be a very strong authority, and very much in point. There was a lease which the guardian surrendered, and took something else which altered the descent. This was held to bind all parties because it was for the benefit of the infant, which was the only thing the Court looked to. Then there is another class of cases, of more modern date, in which the Court has allowed policies comprised in a settlement to be surrendered when there has been a difficulty in keeping up the premiums. It may be said that is ex necessitate rei; but still the principle is the same, namely, the benefit of the infants: see *Hill* v. *Trenery* (3) and *Beresford* v. *Beresford* (4), both of which are cases in which trustees were authorized to surrender policies. Then there is a case before Lord Langdale of *Vicars* v. *Scott* (5), in which he seems to have taken a somewhat stronger view with regard to a policy: "The testator in this case had bequeathed personal property, part of which was a policy of life assurance, to a married daughter, for her separate use for her life, and on her death, among her children absolutely. As to this policy, the tenant for life was willing that it should be kept on foot, and the premiums paid out of her income; and it was proposed that the policy should be assigned to the husband for that purpose, the trustees declining to undertake the duty";

(1) (1739) 1 Atk. 480.

(2) [The report reads *materna*, by a manifest error which the learned judge has corrected.—F. P.]

(3) (1856) 23 Beav. 16.

(4) (1857) 23 Beav. 292.

(5) (1837) 1 Jur. 402.

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and Lord Langdale said that he would permit it if the husband would give security for the amount of principal; but if not he seems to have thought the duty of the Court was to realize the policy at once, although the mother was willing to keep it up. It is true that the case before the Court is not a compromise, and that, no doubt, makes some difficulty; but none of the cases I have referred to were cases of compromise. They went on the footing that what was done was for the benefit of the infants.

Counsel referred me on the former occasion to what Turner L.J. said in *Brooke* v. *Lord Mostyn* (1): "That this Court has power to compromise the rights and claims of infants and persons under disabilities, where those rights and claims are merely equitable, has not been and cannot be disputed. It is a power which has been continually exercised by the Court, and results almost necessarily from the jurisdiction which the Court exercises over trustees. In the exercise of that jurisdiction the Court may in general order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of cestuis que trust who are infants or under disabilities." That is a very general proposition, and whether the Lord Justice meant it to be read literally or not it certainly would cover a case where the Court does consider the course proposed to be obviously for the benefit of the infants, although it may not be a case of absolute necessity; and I cannot say that in the case of Edith it is an absolute necessity.

The most recent case in the reports on the subject is *In re New*. (2) That was a somewhat different case; but the Court there authorized shares in a new undertaking—a company which was reconstructed—to be accepted although there was no power under the will to invest in those shares. Romer L.J. says (3): "The principle seems to be this—that the Court may, on an emergency, do something not authorized by the trust. It has no general power to interfere with or disregard the trust; but there are cases where the Court has gone beyond the express provisions of the trust instrument—cases of emergency, cases not foreseen and provided for by the author of the trust, where the circumstances require that some-

(1) 2 D. J. & S. 415. (2) [1901] 2 Ch. 534. (3) [1901] 2 Ch. 543.

thing should be done." And then (1) he gives as an instance the postponing a sale which the testator has directed to be made at a particular time, and dwells on the necessity for caution in exercising the jurisdiction.

The last case to which I wish to refer is one which was recently heard in camerâ by the Court of Appeal. It is not reported, and I am indebted to Mr. Jessel, who was counsel in the case, for sending me the papers and a statement of what took place. There was a marriage settlement to which father and son were parties. The son covenanted if he survived the father to pay to the trustees of the settlement a certain sum; the father covenanted if he survived the son to pay to the trustees a larger sum. The son got into difficulties, and it was proved, to the satisfaction of the Court, that if he was the ultimate survivor his covenant was not likely to realize anything. The father was a man of great wealth; there was no sort of question as to his solvency; but he was nearly seventy and in bad health, and it was most probable therefore that the son would survive. The proposal was that both covenants should be released in consideration of a sum paid down by the father which was less than the sum which would have been payable if he survived.

I personally fail to see how that is compromise in any proper sense of the word at all. It really was a sale of two contingent reversionary covenants in consideration of a sum down. It appears to me from that case and the case before Lord Hardwicke that the Court has ample jurisdiction to authorize such a transaction, and if it were not for the case of *Peto* v. *Gardner* (2) I should not have any doubt about it. *Peto* v. *Gardner* (2) is certainly very like the present case; there, as here, such of a class of adults and infants as survived A. were entitled to a fund; and they desired to exchange these contingent rights for vested indefeasible interests. The Vice-Chancellor said this: "It is proposed to withdraw a part of the property from the operation of the settlement—deliberately to unsettle it—to take it, on others giving up some other contingent claim. There is nothing in dispute. It is, in fact, a withdrawal by sale or exchange of part of the settled property, in

(1) [1901] 2 Ch. 545. (2) 2 Y. & C. Ch. 312; 60 R. R. 165.

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consideration of the substitution of something else. It appears to me not competent to the Court to carry such an arrangement into execution." *Day* v. *Day* (1) is another decision of the same Vice-Chancellor to the same effect. But what were the transactions in *Pierson* v. *Shore* (2) and in the anonymous case in the Court of Appeal but withdrawals by sale or exchange of a part of the settled property in consideration of the substitution of something else? Further, there is the dictum of James L.J. in *Nunn* v. *Hancock*. (3) It was an action for specific performance in which the objection was taken that the Court had no jurisdiction to make the order for sale under which a reversion in which infants were interested had been sold, and, if that had been a good objection, I apprehend the Court would have refused specific performance, whatever the rights might have been at law. The Court does not grant specific performance if it be clear that there is no title at all in the vendor (4); and though the declaration in *Nunn* v. *Hancock* (3) that all parties were bound was only a dictum, it appears to me that it was a dictum that largely influenced the decision of that case, and to that extent it is valuable as an authority.

I have had some doubt whether I ought not, out of deference to Knight-Bruce V.-C., simply to follow him, although my opinion is the other way; but I do not think in a small matter like this that it is right to put the parties to the expense of going to the Court of Appeal when I have not the slightest doubt what the Court of Appeal would do, and when I should have to decide not only contrary to my own opinion, but contrary to what seems an unbroken chain of authority with the exception of that case.

The result is I will sanction the arrangement, which seems to me to be a thoroughly beneficial one, subject to the qualifications I have mentioned.

Solicitors: *Collins & Cook; Collins & Collins; Duffield, Bruty & Co.; Travers-Smith & Co.*

(1) 9 Jur. 785.
(2) 1 Atk. 480.
(3) L. R. 6 Ch. 850.
(4) *Scott* v. *Alvarez*, [1895] 2 Ch. 603.

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STEVENS *v.* THEATRES, LIMITED.

FARWELL J.

1903

March 18.

[1897 S. 3252.]

Mortgage—Power of Sale—Foreclosure Action—Order nisi for Foreclosure—Exercise of Power—Pursuit of all Remedies at once.

A mortgagee cannot, after the usual order nisi for foreclosure and before the foreclosure is made absolute, exercise his power of sale without the leave of the Court. But the power is suspended only, not extinguished; and a bonâ fide purchaser without notice may get a good title under the power.

On February 20, 1896, the defendant company, Theatres, Limited, executed a mortgage of a theatre and other properties to the plaintiff Stevens. The mortgage contained a power of sale. On September 14, 1897, the plaintiff commenced an action by summons for the foreclosure of his mortgage, and on November 26, 1897, an order was made for foreclosure nisi. This order was in the common form directing accounts, and directing the plaintiff to reconvey the property on payment of what should be found due. The accounts were not proceeded with, and no master's certificate had been made. On December 3, 1897, the mortgagee gave notice to the mortgagor that he intended to sell, and on December 17, 1897, he entered into a contract to sell to Drucker. On February 3, 1898, he conveyed to Drucker in exercise of the power of sale in his mortgage, and in August, 1899, Drucker sold and conveyed to Miss Kate Santley. Miss Kate Santley was afterwards, on her own application, made a party to the foreclosure action, and the action was brought on for the decision of the following agreed point of law: "Whether, assuming that apart from the order of 26th November, 1897, the plaintiff Stevens had, by virtue of the mortgage of the 20th February, 1896, a power of sale exercisable on the 17th December, 1897, he was prevented from exercising such power by reason of the existence of the order of the 26th November, 1897."

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Upjohn, K.C., and *A. àB. Terrell*, for Miss Kate Santley. The whole question is whether a mortgagee can exercise his power of sale after an order has been made for foreclosure nisi. There is no direct authority. But the case comes within the well-known principle that a mortgagee can pursue all his remedies at once. He can bring an action on the covenant, an ejectment action, and a foreclosure action all at once; and on the same principle he can also exercise his power of sale.

[FARWELL J. Is a mortgagee dominus litis after a foreclosure decree nisi? Can he dismiss his action of his own motion?]

Taylor v. *Mostyn* (1) and *Exchange and Hop Warehouses, Limited* v. *Association of Land Financiers* (2) seem to shew that he could not, but that would not prevent his exercising his power of sale. In the recent case of *In re Alpha Co., Ld.* (3), Kekewich J. laid it down that the plaintiff in a debenture-holder's action could discontinue after the usual order; but there the company consented.

Until the passing of the Chancery Procedure Act, 1852, the Court had no power to order a sale of the property in a foreclosure action. Power was given by that Act, and until 1881 there was a conflict of authority whether the Court could sell after decree for foreclosure nisi: see *Wayn* v. *Lewis* (4); *Laslett* v. *Cliffe*. (5) In the latter case Stuart V.-C. treats the foreclosure decree as wholly in favour of the mortgagee, and we submit it is so. In 1881 the Conveyancing Act, s. 25, set at rest all doubts about the power of the Court: *Union Bank of London* v. *Ingram*. (6) But the power of the Court in no way supersedes that of the mortgagee. There is nothing fiduciary about a mortgagee's power of sale, and the analogy of the suspension of a trustee's powers by an administration order does not apply. There is nothing in the decree in favour of the mortgagor which could bring that doctrine in. The pendency of a foreclosure action is not a reason for the Court stopping a sale under the power: *Adams* v. *Scott*. (7)

(1) (1883) 25 Ch. D. 48.
(2) (1886) 34 Ch. D. 195.
(3) Ante, p. 203.
(4) (1853) 1 Drew. 487.
(5) (1854) 2 Sm. & Giff. 278.
(6) (1882) 20 Ch. D. 463.
(7) (1859) 7 W. R. 213.

There is no doubt that the power of sale continues to exist after a foreclosure absolute: *In re Alison.* (1) In *Watson* v. *Marston* (2) Knight Bruce L.J. expressed a doubt whether a good title could be made under the power; but the case only decided that a contract, inadvertently entered into by a mortgagee, to sell under his power after a foreclosure decree absolute, will not be specifically enforced.

There is no difference in the form of decree nisi whether the action be for redemption or foreclosure, and it would be a great hardship if, by merely taking out a summons for redemption and getting an order, the mortgagor could take away the mortgagee's power of sale. The Court never interferes with a mortgagee's power of sale except upon the terms of the mortgagor bringing the money into court.

We have only found two cases in which the Court has made an order for sale after a foreclosure decree nisi: *In re Claire's Estate* (3) and *Brewer* v. *Square* (4); and the circumstances seem to have been peculiar.

Stewart-Smith, K.C., and *Ward Coldridge*, for the mortgagee.

H. E. Wright, for the trustee in bankruptcy of Drucker.

Gore-Browne, K.C., and *George Wallace*, for the mortgagor.

The question is a simple one depending wholly on the words of the judgment, which is binding on both parties. It directs the mortgagee to reconvey upon payment. Neither the parties nor the Court can alter the meaning of the judgment. The mortgagee is clearly bound not to do anything inconsistent with his obeying the judgment. The rights of the parties under their original contract are merged and changed into a new relation created by the judgment: *Hill* v. *Rowlands.* (5) After foreclosure absolute all the mortgagor's rights are put an end to, and there is no inconsistency in the mortgagee's exercising his power; but while the order nisi is in force the power of sale is suspended at any rate, it is not necessary to argue that it is extinguished; but *Campbell* v. *Holyland* (6) seems to

(1) (1879) 11 Ch. D. 284.
(2) (1853) 4 D. M. & G. 230, 236.
(3) (1889) 23 L. R. Ir. 281.
(4) [1892] 2 Ch. 111.
(5) [1897] 2 Ch. 361.
(6) (1877) 7 Ch. D. 166.

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shew that the power could not be exercised after foreclosure absolute.

Upjohn, K.C., in reply. *Heath* v. *Pugh* (1) shews that the previous rights of the parties are not merged in the judgment for foreclosure.

FARWELL J. This application raises a neat abstract point of law, on which I am told there is no authority: this may be because powers of sale were not usually inserted in mortgages until seventy or eighty years ago: see *Clarke* v. *Royal Panopticon.* (2) [His Lordship then stated the facts of the case and the agreed question as above, and proceeded:—]

I propose to qualify my answer to that question in order to preserve any rights that Miss Santley may have as a purchaser for value without notice, if she can hereafter prove that she is in that position.

Now this question—whether a decree for foreclosure directing accounts and reconveyance, or, by parity of reasoning, a decree for redemption directing accounts and reconveyance, on payment, operates to prevent the exercise of the power of sale in the mortgage, or that given by the statute—has to be decided on principle in the absence of authority. The first proposition, which I think is plain, is this—neither the mortgagee nor the mortgagor is entitled to dismiss his action, or to discontinue after judgment. The general principle on which the Court acts with regard to actions of this sort is to regard the plaintiff as dominus litis until judgment; but if, and so far as the judgment operates for the benefit, not merely of himself, but of some one else, he cannot get rid of his action mero motu after judgment. If authority is necessary, I refer to *Taylor* v. *Mostyn* (3) and the *Exchange and Hop Warehouses, Limited* v. *Association of Land Financiers.* (4)

Now, if the plaintiff cannot get rid of his action after judgment because the judgment is for the benefit also of the

(1) (1881) 6 Q. B. D. 345; (1882) 7 App. Cas. 235.
(2) (1857) 4 Drew. 26.
(3) 25 Ch. D. 48.
(4) 34 Ch. D. 195.

defendants, it must follow that he cannot in any way vary the form of that judgment by doing an act which would put it out of his power to perform that which the Court has directed him to do as the condition of getting the judgment.

The mortgagee has got his title absolute at law, but the mortgagor has his right of redeeming, and the mortgagee has the right to come to this Court and say, "Put an end to that power." The Court regards with impartiality both mortgagor and mortgagee. It does not deprive the mortgagee of his legal rights without giving him corresponding benefits, nor does it deprive the mortgagor of his right to redeem without giving him an opportunity of paying what is due when the sum is finally ascertained. When the parties have once taken the judgment of the Court neither party, in my opinion, is entitled without the leave of the Court to put it out of his own power, by any act of his own, to obey the judgment of the Court. It is said to be a hardship on the mortgagee that the mortgagor by commencing proceedings for redemption and getting his judgment can prevent the exercise of the power of sale. So far as commencing proceedings is concerned it is clear that that does not prevent the exercise of the power of sale. That is decided by *Adams* v. *Scott*. (1) So far as regards any hardship from the judgment of the Court, the Court may be trusted, I hope, not to make any decree which will operate harshly or unfairly on either party. In the case suggested in argument, if the mortgagee is on the point of entering into a contract to sell a property which is difficult to dispose of, or an insufficient security, I apprehend the Court would take that into consideration before it made a decree for redemption, and it might possibly, instead of ordering redemption or in addition thereto, give some direction for carrying out that particular sale. I am not pressed with that difficulty, because it appears to me to be a difficulty which assumes a certain want of perception and power on the part of the Court of which I should be unwilling to admit it was guilty. Nor is there any hardship in delay in prosecuting accounts and inquiries, for either side can come to

(1) 7 W. R. 213.

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the Court and say, "It is no use keeping this hanging over us; let us stay all further proceedings," as was done in the *Exchange and Hop Warehouses Case.* (1)

I hold, therefore, that the power of sale cannot be exercised after the judgment nisi without the leave of the Court, because it prejudices the rights given to the mortgagor by the Court under the direction to reconvey. The question next arises, What is the effect of the order of the Court? Does this extinguish the power or does it not? That would affect materially the case of Miss Santley, if she can prove herself to be a purchaser for value without notice having the legal estate. In my opinion the power of sale is not extinguished. It is important to remember that the mortgagor can institute proceedings for and obtain redemption almost as a matter of course. If the decree nisi for redemption absolutely extinguished the power of sale, it would surely have been urged in argument or taken into consideration in some case as a reason against granting such a decree; but no trace of any such case can be found. If the power is once extinguished it must be gone for ever; but I think this would be inconsistent with the view taken by the Lords Justices in *Watson* v. *Marston.* (2) That was a case of specific performance, and the Court declined to force the vendor to convey as the purchaser desired in exercise of his power of sale after a decree for foreclosure absolute. The conditions of sale, to some extent, held out that course as available, because the vendor was described as a mortgagee with power of sale. But the ground on which it was put was hardship on the vendor, who by exercising the power of sale would open the foreclosure. It is true that in the course of the argument Knight Bruce L.J. makes an obiter observation that the purchaser might be preferring a bad to a good title; but it is merely a suggestion, and I do not find that the Lords Justices ever said there was no title at all to sell under the power of sale; if it could have been said that there is no such power existing, it would have been a short answer to make to a man who was insisting on having a con-

(1) 34 Ch. D. 195. (2) 4 D. M. & G. 230.

veyance under that power. The foreclosure nisi, in my opinion, does not destroy the power; the remedies of the mortgagee are merely suspended for the purpose of carrying out that particular relief which he has sought, and would remain available for him if, for example, both parties were to agree that all the proceedings should be stayed, or the Court should order, as it did in the *Exchange and Hop Warehouses Case* (1), the taking of the account to be stayed. In that case the direction to reconvey still remained. It appears to me it would be impossible to hold that the power of sale was gone by reason of that direction to reconvey, although the Court had said it was idle to go on with the accounts because the balance was so enormously against the mortgagor that it was useless.

This is a question of some importance to purchasers, because, assuming there is no lis pendens registered, a purchaser buying in good faith from a mortgagee under a power of sale would find he had no title at all if the power was absolutely extinguished. I do not know of any case in which a power has ever been held to be extinguished by reason of any of the usual decrees of the Court, such as the decree for administration. Even a decree for dissolution of marriage by the Court does not of itself extinguish the settlement which was made upon the marriage, or any powers contained therein. A decree for the administration of the trusts of a will or for the execution of the trusts of a settlement does not extinguish the power: it merely requires the person exercising it to come for the leave of the Court before he does it. In my opinion, if the mortgagee had in this case come to the Court he might have got leave to exercise the power. I see nothing in the fact that s. 25, sub-s. 2, of the Conveyancing Act gives the Court a power of sale inconsistent with leaving in existence the power given by the deed or by s. 19 of the Act. The power of sale in s. 19 is given only to mortgagees who have a mortgage by deed, whereas the power of sale by the Court and the power to ask the Court to direct a sale under s. 25 extends to equitable mortgages as well. There is nothing in the least inconsistent to my mind between the two sections.

(1) 34 Ch. D. 195.

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The result is, in my judgment, that the mortgagee could not exercise the power of sale without the leave of the Court, but that the power of sale was not extinguished, so that the question whether a purchaser from a mortgagee got a good title or not will depend on whether she is affected with notice or whether she got the legal estate without notice.

The declaration finally settled was:—

"That the mortgagee could not exercise his power of sale without the leave of the Court so as to give a good title to any one other than a purchaser for value without notice. But this is not to preclude the mortgagee from setting up any other equity he may have in any action brought by the mortgagor."

Solicitors: *Fladgate & Co.; W. H. Lendon; Wilkinson, Howlett & Wilkinson; King, Wigg & Co.*

J. R. B.

ROBINSON *v.* GIFFARD.

FARWELL J.

1903

March 18, 19.

[1901 R. 1034.]

Crown—Grant for Services rendered—Consideration—Estate Tail—Reversion in Crown—King de facto et de jure—Estate Tail whether barrable—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 18—34 & 35 *Hen.* 8, *c.* 20, *s.* 2.

A reversion to the Crown, expectant on the determination of an estate tail in realty granted by the Crown to a subject for services, being excepted by s. 18 of the Fines and Recoveries Act, 1833, from the operation of that Act, and protected by the statute 34 & 35 Hen. 8, c. 20, cannot be barred; and, although the consideration is not stated in the grant, it will be presumed after lapse of time—unless the grant on the face of it clearly shews that it is a voluntary gift—and the onus is on those who seek to take the grant out of the statute of Henry VIII. to prove the want of consideration.

But where a grant from the Crown shews on the face of it that it is a voluntary gift, the reversion expectant on the estate tail created thereunder is not within the statute of Henry VIII., and is barrable.

Special Case.

By a grant by a writ of Privy Seal dated July 24, 1675, King Charles II., "for divers good causes and considerations," granted unto trustees certain fee farm and other rents issuing out of certain lands in the counties of Stafford, Hereford, Warwick, Worcester, Salop, and Leicester upon trust, as to 100*l.* per annum, part of the premises, for the use of Mary Pendrell, relict of Richard Pendrell, for her life, and from and after her decease for the use of the heirs of the body of Richard Pendrell; and as to the other parts of the premises, upon the like trusts for the use of the other persons therein named, members of the Pendrell family, and the heirs of their bodies; and it was thereby provided that, as any of the persons thereinbefore named should happen to die without issue, the part or share of him, her, or them so dying should remain and be for the use of the survivors and survivor of them and the heirs of their respective bodies equally, share and share alike, so long as any of the issues of any of their bodies should continue, and for

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want of such issue in trust for King Charles II., his heirs and successors.

This grant did not state for what consideration it was made, but it was well known that Richard Pendrell and his brothers William, Humphrey, and George, and their kinsman W. Yates, assisted King Charles II. in his escape from the armies of the Commonwealth after the battle of Worcester in August, 1651, and also assisted in hiding him at White Ladies and Boscobel, in the county of Stafford, until he made good his escape to France. King Charles II. did not return to England and assume the government of the country until the year 1660.

By a decree made by the Vice-Chancellor of England on December 10, 1846, in a suit of *Giffard* v. *Withington* (1), wherein T. W. Giffard (the then trustee of the deed of grant) was plaintiff, and W. Withington and Winifred his wife, and R. McLaren, and Mary his wife and others (the said Winifred Withington and Mary McLaren being the then heirs of the body of Richard Pendrell) were defendants, it was declared that the six several annuities specified in the said grant were of the nature of real estate and well entailed by the same grant.

In the years 1856, 1857, and 1859 Robert McLaren and James Withington, who were then the heirs of the body of Richard Pendrell, purported for valuable consideration to execute in favour of George Robinson disentailing assurances of their respective parts or shares of and in the annuity of 100*l.* per annum granted to Mary Pendrell and the heirs of the body of Richard Pendrell by the said grant. These disentailing assurances were duly enrolled in the High Court of Chancery pursuant to the provisions of the Fines and Recoveries Act, 1833; and George Robinson thereafter received the annuity of 100*l.* until his death in 1880.

The plaintiff was the universal legatee under the will of George Robinson, and, after the death of the latter, had been in receipt of the said annuity of 100*l.* until the year 1900, when payment of the same was stopped by the defendant Giffard, who was the present trustee of the said grant. The plaintiff then commenced this action to establish his right to receive the said

(1) Unreported.

annuity, and under an order of the Court this special case was stated, the questions for the opinion of the Court being—whether an estate tail was created by the grant; and, if so, whether it had been effectually barred by the three deeds above mentioned.

Certified copies of numerous entries in the State Papers (Domestic) of Charles II. between the years 1660–1675, relating to money grants to various members of the Pendrell family, were put in evidence, of which the following are examples:—

"1663. July 10.

"Lord Treasurer Southampton to Secretary Bennett. He is to procure a warrant for 200*l.* to William, John, Richard, Humphrey, and George Pendrell, who aided the King's escape; and for 100*l.* for Joan Pendrell, the person who gathered sticks and diverted the horsemen from the oak His Majesty was in."

"1664. July 14.

Annuities to the Pendrells.

"Having reflected upon the great loyalty and fidelity of William Pendrell and Joan his wife, Richard Pendrell (1) and Mary his wife, John Pendrell, Humphrey Pendrell, and George Pendrell, and particularly in the time of our greatest danger, after our escape from Worcester, when they used all their endeavours to secure us from the search and violent pursuit which our enemies made

(1) This Richard Pendrell died in Lincoln's Inn Fields, and was buried at St. Giles-in-the-Field, Broad Street, Bloomsbury. His tomb bears the following inscription:—

"Here lies Richard Pendrell, preserver and conductor to his sacred Majesty King Charles the Second of Great Britain after his escape from Worcester fight 1651, who died July 8th, 1671.

"Hold, passenger, here's shrouded in this herse
Unparallelled Pendrell, through the universe.
Like when the Eastern Star from Heaven gave light
To three lost Kings, so he in such dark night
To Britain's Monarch, lost by adverse war,
On earth appears a second eastern star.
A pole a stern in her rebellious main,
A pilot to her royal Sovereign came.
Now to triumph in heaven's eternal sphere
He is advanced for his just steerage here,
Whilst Albion's Chronicles with matchless fame
Embalm the story of great Pendrell's name."

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to pursue us, we have thought fit by some particular mark of our favour and bounty to them to express the value we have put upon their good services and affections, and to beget in posterity a like confidence for the future; and do resolve to grant unto the same William Pendrell and his wife during their lives and the longer liver of them an annuity of 100*l.*, to Richard Pendrell and Mary his wife during their lives and the longest liver of them an annuity of 100*l.*, to John Pendrell during his life an annuity of 100 markes, and to George Pendrell during his life an annuity of 100 markes, the same to be paid to them respectively out of the issues, rents, and revenues arising to us within our counties of Stafford, Hereford, Salop, and Worcester by the hands of the receiver there for the time being at Michaelmas and Our Lady Day by equal portions, the same to commence from Our Lady Day past; and in case of any failure of payment then to be paid out of our treasure remaining from time to time in our Exchequer. You are therefore to prepare a bill fit for our royal signature to pass our Great Seal containing a grant of the several annuities above mentioned to every of those persons to be paid as aforesaid with such clauses to be therein inserted as are usual in like grants, and such as yourself shall think needful, &c."

"1672. January 31.

"To the King's Most Excellent Majesty.

"The humble petition of Humphrey Pendrell,

"Sheweth—

"That your petitioner humbly presumes to inform your Majesty that he was the only man that told your Majesty there was 1000*l.* bid for him that would discover your Majesty when your Majesty was in mine and my brothers' keeping. And that your petitioner was the man that carried your Majesty from Boskabill to Mr. Whitgroves and said to your Majesty that his horse carried a very great load for he had the price of Three Kingdoms upon his back.

"That your Majesty was pleased to say we should have all pensions alike. But so it is (may it please your Majesty) your petitioner hath only 50 markes per annum and two of his other

brothers have 100*l.* per annum, and your petitioner hath a very great charge of children and hath marryed two of his daughters and given them portions, the which together with his other great charge of children hath put your petitioner much in debt . . . .

"He therefore humbly begs (having never troubled your Majesty in this nature before) that your Majesty would be graciously pleased to extend your Majesty's bounty towards him and to grant unto your petitioner two hundred pounds for the satisfaction of his creditors which do continually press your petitioner. And as in duty bound he shall ever pray, &c.

"(Minute.)

"His Majesty commands this petition be immediately recommended to the Right Hon. the Lord High Treasurer to consider of and to find some way to provide for this petitioner's gratification. His Majesty desiring his Lordship may take the petition into his particular care and give him a speedy dispatch."

"1674. March 4th.

"Upon the petition of Richard Yates, whose father having conducted the King from Worcester to Whiteladies, was afterwards hanged because he would not discover where he last saw his Majesty, praying a sum of his Majesty, &c.

"His Majesty is graciously pleased to recommend this petition to the Right Hon. the Lord High Treasurer of England to provide in some measure for the petitioner in such way and manner as hath been done for other persons that were instrumental in his Majesty's happy escape."

Upjohn, K.C., and *Martelli*, for the plaintiff. The first question is whether the annuities are of the nature of real estate and well entailed.

[FARWELL J. I shall follow the decision of the Vice-Chancellor of England in *Giffard* v. *Withington*. (1)]

There remains the question whether the estates tail were barrable. The Fines and Recoveries Act, 1833, s. 18, provides that the power of disposition conferred by the Act shall not

(1) Unreported.

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extend to tenants of estates tail who are restrained from barring their estates tail by 34 & 35 Hen. 8, c. 20, s. 2; but the Act of Henry VIII. only applies, as appears by its preamble, to estates tail granted by the Crown as a recompense for services rendered by a subject: Co. Litt. 372, b. 6; *Perkins* v. *Sewell.* (1) Further, the services must be rendered to one who is King de facto et de jure. Coke, in his 3rd Institute, pp. 1–7, commenting on the Statute of Treasons (25 Edw. 3), says that "Le Roy (the King) is to be understood of a King regnant, and not of one that hath but the name of King." Here Charles II. after Worcester was a fugitive, and was no longer King de facto. The Lord Protector was in fact the King. Lastly, the services are not stated in the grant. In *Duke of Grafton* v. *London and Birmingham Ry. Co.* (2) the grant was without consideration, and it was held that the Act of Henry VIII. did not apply, and that the estate tail had been effectually barred. Here, the many entries in the State Papers between 1660 and 1674, particularly that of July, 1664, shew that the services in question were compensated and the Pendrell family provided for by gifts of annuities and sums of money. The grant of 1675 was, therefore, the pure bounty of the King.

H. M. Humphry, for parties entitled if the estates tail were not barrable. The Act of Henry VIII. applies. As to the objection that Charles II. was not King de facto when the services were rendered, by the law of England there must always be a King. Charles II. was certainly King de jure at the time, and when he came in 1660 he must be taken to have been King de facto et de jure from the death of Charles I. The statutes 12 Car. 2, c. 11, and 13 Car. 2, c. 1, support this view. The fact that the services are not stated in the grant is not a fatal objection. There is ample record of the services in the State Papers, which shew that assistance was given to the Pendrells from time to time; but by the grant permanent provision was made for them. At any rate, the consideration will be presumed at this distance of time, and the onus is on the plaintiff to prove the contrary: *Perkins* v. *Sewell.* (1)

Underhill, for the defendant trustee.

Upjohn, K.C., in reply.

(1) (1768) 1 W. Bl. 654. (2) (1838) 5 Bing. N. C. 27; 50 R. R. 595.

FARWELL J., after stating the facts, continued:—The questions raised on the special case are, first, was an estate tail created by the grant; and, secondly, if there was, has it been effectually barred. The first question is concluded by the decree of the Vice-Chancellor of England on December 10, 1846, in the case of *Giffard* v. *Withington*. (1) I of course follow that decision, and hold that an estate tail was created. The second question, whether it has been barred or not, depends upon the 18th section of the Fines and Recoveries Act, 1833, which provides that the power of disposition contained in the Act, which was a power enabling the reversion in the Crown to be barred, shall not extend to tenants of estates tail who by an Act passed in the 34th and 35th years of the reign of King Henry VIII., or by any other Act, were restrained from barring their estates tail. I am, therefore, thrown back upon the Act of 34 & 35 Hen. 8, c. 20. On that Act, there is a reading in Co. Litt. 372, b. 6, where Lord Coke points out by reference to the preamble of the Act that the estate tail must be created by a King and not by any subject, and that the grant must be in consideration of money or in recompense for services rendered to the King. Now two points are taken. First, it is said that King Charles II. at the time that he received the services of the Pendrells after the battle of Worcester was not a King de facto, and, therefore, that he had no subject within the meaning of the Act, that he was at the time a fugitive, and the power of the realm was in the hands of the Protector. In my opinion, that is not the true view. The subsequent legislation when King Charles II. was restored proceeded to wipe out by the Acts of 12 Car. 2, c. 11, and 13 Car. 2, c. 1, to which reference has been made, the legislation of the Commonwealth, and to declare that the assent of the King is necessary to all Acts of Parliament, and that Acts of Parliament passed without such assent are null and void. That accords with the statement in Coke's Third Institute, pp. 6, 7, that by the law of England there is no interregnum, for by law there must be always a King. It accords also with the numeration of the statutes of Charles II., where the year

(1) Unreported.

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of the Restoration, 1660, appears in the Statute Books as the 12th of King Charles II. In my opinion, therefore, King Charles II. after the battle of Worcester was for the purposes of this Act of Henry VIII. a King to whom services might be rendered within the meaning of the Act. Reference was made to the Statute of Treasons (25 Edw. 3), and to the distinction between a King de jure and a King de facto; but I think that that particular Act depends upon other considerations. It became necessary during the various civil wars that took place in England in early times that there should be some security for people who lived or attempted to live quietly, and that a person should not be a traitor one year and a loyal subject the next; and, consequently, there was a provision made which enabled services to be safely rendered to the King de facto, although the King de jure might afterwards come to his own. I do not think that any similar considerations can be properly applied to this Act of Henry VIII. Of course, there is this necessary consideration, that unless the King de jure had afterwards become King de facto he could not have made a grant which could be effectual, because there would be nothing out of which to grant it; but inasmuch as Charles II. did in fact afterwards become King de facto, then in my opinion he was King from the death of Charles I., and the services rendered to him were services by his subjects to the King within the meaning of the Act of Henry VIII.

The other point is this. It is said that there are a number of grants to the Pendrells appearing in the Domestic Records of Charles II.—grants of sums of money to pay debts, and of sums of money for life—which are expressed to be in consideration of services. For example, take the one in the 16th year of the reign of King Charles II. [His Lordship read the entry of July 14, 1664, and continued:—] It is urged that those records shew that the consideration for these earlier grants was these particular services, and that they had been satisfied, and that the present grant, which is simply "for divers good causes and considerations," was pure bounty. In my opinion there are two answers to that. I infer from the evidence that these "divers good causes and considerations" were the same

services as those referred to in the earlier petitions and grants for which grants of sums of money and annuities were made. It is a matter of common knowledge that when the King first returned there were certain difficulties with regard to finances which rendered it impossible for him to grant rewards to all his subjects who had been faithful to him in the time of his trouble, and it may be that large numbers of them had to take what they could get till matters improved. I think that the true result of the documents before me is that the grant of 1675 was a final grant to which all the other temporary aids led up. But even if it were not so, I think the judgment of Lord Mansfield in *Perkins* v. *Sewell* (1) shews that it is for the persons who deny the existence of services to prove the contrary. "It must therefore be admitted," he says, "that in order to obtain the protection of the statute of Hen. 8, the estate tail must be of the gift or provision of the King, by way of reward. As for the services, which are the consideration of such gift, these must at a distance of time be presumed, and need not be proved. To take it out of the statute you must shew that it is not of the gift or provision of the King," and in that case the consideration was held to be proved. But in the case of the *Duke of Grafton* v. *London and Birmingham Ry. Co.* (2) the grant was stated to be in consideration of the love and affection that the King had for his natural son the Earl of Euston, who was then aged nine; so that on the face of the grant itself the consideration was not within the meaning of the Act. On these grounds, therefore, I hold that the exception in the 18th section of the Fines and Recoveries Act applies, and that the case is within the statute of Henry VIII., and therefore these estates are not barrable.

Solicitors for plaintiff: *Francis & Johnson.*
Solicitors for defendant Giffard: *Nussey & Fellowes.*
Solicitors for other defendants: *Petch & Co.*

(1) 1 W. Bl. 654, 659. (2) 5 Bing. N. C. 27; 50 R. R. 595.

H. L. F.

BUCKLEY J.

1903

Feb. 14, 19.

In re WILMER'S TRUSTS. MOORE *v.* WINGFIELD.

[1902 W. 3845.]

Perpetuity—Remoteness—Equitable Contingent Remainders—Child en ventre sa mère—Relation back.

The rule of law as to remoteness—which allows absolute ownership to be suspended for a life or lives in being and twenty-one years afterwards, and treats a child en ventre sa mère as a life in being—is not infringed by the fact that when the instrument limiting the estates comes into operation (in the case of a will the devisor's death) the first life tenant is en ventre sa mère; but on his subsequent birth alive the law applies the doctrine of relation back, and treats the child as having been born alive at the time when the instrument came into operation, whether the application of the doctrine is for the benefit of the child, or immaterial to him, or to his actual disadvantage.

The doctrine of *Doe* v. *Lancashire*, (1792) 5 T. R. 49; 2 R. R. 535, applied.

A testatrix devised real estate to trustees upon trust to pay the income to M. during her life, and after her death to stand possessed of the real estate upon trust for the second and every younger son of M., born or to be born, successively, with remainder, after the death of each such son, upon trust for his first and other sons successively in tail male.

The testatrix died in October, 1880, at which date M. had had (*a*) a son, who died in 1877, (*b*) a son who was disqualified by the will from taking under the limitations, and she was pregnant of (*c*) a third son, S., who was born in February, 1881:—

Held, that the limitations did not transgress the rule against remoteness, that the sons of S. took valid estates in tail male in remainder, and that it was immaterial that it was disadvantageous to S. to apply the doctrine of relation back of his birth to the date of the death of the testatrix, and thus prevent him from taking a larger estate than an estate for life.

Anne Wilmer, widow, by her will dated September 25, 1876, devised all her residuary estate to trustees upon the trusts thereinafter declared; and bequeathed all her residuary personal estate to her trustees upon trusts for sale and conversion and reinvestment in real estate to be held upon the trusts thereinafter declared. And the testatrix declared that the trustees should stand possessed of her residuary real estate

and the hereditaments purchased as thereinbefore directed (thereinafter collectively referred to as "the Wilmer Estate") upon trust to pay the income thereof to her daughter, Anna Maria Moore, during her life, and after her death to stand possessed of the Wilmer estate "upon trust for the second and every younger son of the said Anna Maria Moore, born or to be born, successively, during his life, without impeachment of waste, with remainder, after the death of each such son, upon trust for his first and other sons, successively, in order of seniority, in tail male, so that every elder (except the eldest) son of the said Anna Maria Moore, born or to be born, and his first and other sons and their issue male respectively, shall take before every younger son of the said Anna Maria Moore and his first and other sons and their issue male respectively, with remainder in trust for the second and every other son (except the eldest son) of the said Anna Maria Moore, successively, in order of seniority in tail," with certain remainders over.

The will also provided that if any person other than the eldest son of Anna Maria Moore should become entitled to another estate, called "the Barne Estate," the next gift in remainder of the Wilmer estate should take effect.

On October 28, 1880—the date of the death of the testatrix—Anna Maria Moore had had one child (Stephen Wilmer Moore, who died on June 17, 1877), and a second son (Randal Kingsmill Moore, who afterwards became entitled to the Barne estate), and she was pregnant of a third son, Stephen Thomas Moore, who was born on February 7, 1881.

Anna Maria Moore died intestate on December 22, 1886.

S. T. attained the age of twenty-one in February, 1902, and, being advised that the remainders after his life estate were void for remoteness, and that he was entitled to an estate tail, he executed a disentailing assurance, dated September 15, 1902, and took out an originating summons, to which the surviving trustee of the will and R. K. Moore, as heir-at-law and next of kin of the testatrix, were defendants, asking for a declaration that he was at the date of the disentailing assurance entitled as tenant in tail male in possession to the hereditaments and securities representing the Wilmer estate.

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Buckmaster, K.C., and *Sargant*, for the plaintiff. The estate which was limited to the plaintiff's children was void, because, first, it offended against the rule against perpetuities, which provides that an estate can only be limited to take effect during a life or lives in being and twenty-one years afterwards; secondly, because the event on which a remainder is to depend must be a common possibility and not a double possibility, or a possibility on a possibility, as, for instance, to an unborn son of an unborn son. Therefore these subsequent limitations are void, and the Court will apply the cy-près doctrine, and hold that the plaintiff takes an estate in tail.

On the first point we submit that the limitations in remainder are bad. The plaintiff was not actually born at the date of the death of the testator. At that time there was a child en ventre sa mère; but it might have turned out to be a daughter, or might have been stillborn, and in that case the remainders would have been void under the rule against perpetuities. That is enough for our purpose, for we only have to shew that the estate might have failed, not that it did fail. To be good, the limitation must vest within the prescribed period. No doubt for some purposes the Court would hold that the plaintiff was alive at the death of the testator; but it will not do so for all purposes. It will only do so where it is for the benefit of the child. Here it would be better for the plaintiff to hold that he was not alive when the testatrix died, for in that case he would by the cy-près doctrine take an estate in tail which he could bar, and in that way become entitled to the fee; whereas if he was alive he would only take an estate for life. That the Court only treats a child en ventre sa mère as living when to do so is advantageous for the child is shewn by *Blackburn* v. *Stables* (1), *Doe* v. *Lancashire* (2), *Doe* v. *Clarke* (3), and *Blasson* v. *Blasson*. (4)

The decision in *In re Burrows* (5) was not on this point, for there was no gift in that case to the child; but the result was for its benefit, for the property was given to its mother.

(1) (1814) 2 V. & B. 367, 369; 13 R. R. 120.
(2) 5 T. R. 49; 2 R. R. 535.
(3) (1795) 2 H. Bl. 399; 3 R. R. 430.
(4) (1864) 2 D. J. & S. 665.
(5) [1895] 2 Ch. 497.

Doe v. *Lancashire* (1) was only an application of the civil law to the facts of that particular case. Under the ordinary limitation to A. for life with remainder to his son at twenty-one, if A. died leaving his wife pregnant of a son, the period would be extended for the balance of the period of pregnancy, so as to enable the son to take; but that would be because the extension would be for the son's benefit.

Long v. *Blackall* (2) is distinguishable. It was the case of an unborn tenant for life being treated as alive for the purpose of considering whether a limitation over was too remote, and that case is fully discussed in *Thellusson* v. *Woodford.* (3)

The child unborn will always be presumed to be alive when the assumption is for its benefit; but there is no reported case of such an assumption being made to the disadvantage of the child.

As to the rule against a possibility upon a possibility. The first possibility here was that the plaintiff would be a son. The rule applies to equitable as well as to real estates: *Whitby* v. *Mitchell.* (4) In *In re Bowles* (5) Farwell J. overlooked *Humberston* v. *Humberston* (6) and *Monypenny* v. *Dering.* (7) The rule against perpetuities is not necessarily complied with because in the result the period is not exceeded; it is infringed if the limit may possibly be exceeded: Williams on Real Property, 12th ed. p. 319.

Austen-Cartmell, for R. K. Moore, the heir-at-law of Anna Maria Moore and heir-at-law and next of kin of the testatrix, adopted the plaintiff's contention that the limitations after the life estate of the plaintiff failed, but contended that the cy-près doctrine did not apply so as to give him an estate tail.

S. Dickinson, for the surviving trustee of the will. The trustee's duty is to protect the interests of the plaintiff's unborn sons. The limitations to the third son's children take effect in possession on the termination of a life in being and are good. The law has been settled for more than a century. The rule is

(1) 5 T. R. 49; 2 R. R. 535.
(2) (1797) 7 T. R. 100; 4 R. R. 73.
(3) (1799) 4 Ves. 227, 333, 337; (1805) 11 Ves. 112, 143, 150; 4 R. R. 205; 8 R. R. 104.
(4) (1890) 44 Ch. D. 85.
(5) [1902] 2 Ch. 650.
(6) (1716) 1 P. Wms. 332.
(7) (1852) 2 D. M. & G. 145.

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correctly laid down in 1 Jarman on Wills, 4th ed. pp. 252, 253, thus: "A possible addition of the period of gestation to a life and twenty-one years, occurs in the ordinary case of a devise or bequest to A. (a *male*), for life, and after his death to such of his children as shall attain the age of twenty-one years, or, indeed, in the case of a devise or bequest simply to the children of A. (a male), who shall attain majority, though not preceded by a life interest; in either case A. may survive the testator, and die leaving a wife enceinte, and, as such child would not acquire a vested interest until his majority, the vesting would be postponed until the period of twenty-one years beyond a life in being, with the addition, it might be, of nine or ten months; and if, to either of these hypothetical cases, we add the circumstance that A. the parent, were (as of course he might be) an infant en ventre sa mère at the testator's decease, there would be gained a double period for gestation, (namely) one at the commencement, and another at an intermediate part of the period of postponement. To treat the period of gestation, however, as an adjunct to the lives is not, perhaps, quite correct. It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child en ventre sa mère is considered as a life in being."

The rule that a child en ventre sa mère is to be treated as in esse is not confined to the cases in which the assumption is for his benefit or not to his injury, but applies to cases where the assumption is to his prejudice. *Thellusson* v. *Woodford* (1) is opposed to the plaintiff's contention. The supposed limitation of the rule was not referred to in *In re Burrows*. (2) *Blasson* v. *Blasson* (3) does not help the plaintiff; that was a decision on the special words of the particular will. *Whitby* v. *Mitchell* (4) has no application, for there is no possibility upon a possibility in the present case. *In re Bowles* (5) shews that the rule does not apply to equitable estates.

(1) 4 Ves. 227, 333, 337; 11 Ves. 112, 143, 150; 4 R. R. 205; 8 R. R. 104.
(2) [1895] 2 Ch. 497.
(3) 2 D. J. & S. 665.
(4) 44 Ch. D. 85.
(5) [1902] 2 Ch. 650.

Buckmaster, K.C., in reply, referred to *Richards* v. *Richards*. (1)

BUCKLEY J. This case has been excellently argued. I do not postpone giving my judgment, for I hope that, while the cases which have been cited and the comments of counsel upon them are fresh in my recollection, I may be able to express more intelligibly and coherently the reasons for the conclusion at which I have arrived than if I took time to put my judgment into writing.

The material facts are short, and very simple. [His Lordship stated them, and continued:—]

The limitations are of equitable estates, and are limited, as it appears to me, by way of equitable contingent remainders.

In applying the law as to remoteness, the first proposition to be regarded is that I must look, not at the events which have actually happened, but at the events which might have happened. If the limitations are such that events might have so turned out as that the rules as to remoteness would have been infringed, then the limitations fail, although in the events which actually did happen the legal period was not exceeded. Of course that is beyond dispute.

Secondly, it cannot be disputed, and it is not disputed, that the rule of law as to remoteness admits of absolute ownership being suspended for a life or lives in being and twenty-one years afterwards, and that for the purposes of this rule a child en ventre sa mère is treated as a life in being. That is not really the question which lies at the root of this case. What I have to look at is this. When the testatrix died—on October 28, 1880—was the limitation upon trust, after a life estate to the plaintiff, in favour of his first and other sons successively, in order of seniority, in tail male, one which might have failed by reason of being too remote, or, in other words, could events have so turned out that there would not have come into possession a person who would have been entitled to the inheritance within the time limited by the rule? The plaintiff's counsel say that when Mrs. Wilmer died it was impossible to

(1) (1860) Joh. 754.

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say whether the child of which Mrs. Moore was then pregnant was of the male or of the female sex, or whether that child would ever be born alive; and therefore the argument is advanced—and must succeed if it be well founded—that if the child had turned out to be a daughter, or if no child had been born alive, the limitation would have been void, and that inasmuch as either of those events might have happened, the limitations are void notwithstanding that neither event has happened. But if it be a correct rule of law that on the child being born on February 7, 1881, and turning out to be a boy, you must refer back that state of facts to the earlier date, that of the death of the testatrix, and say retrospectively that at that earlier date events had so turned out that the rule against perpetuities could not be infringed because there was a child in existence, although en ventre sa mère, who was a male and who was born alive, then of course it cannot be contested but that the limitation is perfectly good. It is quite true that the person to take is "the second and every younger son of Anna Maria Moore, born or to be born"; but if once it is established that at the death of the testatrix there was a son of Anna Maria Moore born—in the proper sense of the word—and who could take, then, of course, there is no objection to the limitation; because in that state of things it could not turn out that there would not be a person entitled to take the estate within the time limited.

To my mind the whole point of the case is this: Am I entitled, after February 7, 1881, when it was known that a child was born alive and that it was a male, to throw that back and say retrospectively that that was the state of facts at the date of the death of the testatrix, although at that date it could not be said that it was so because what was going to happen was necessarily unknown?

Upon that point the dominant authority, as it appears to me, is *Doe* v. *Lancashire*. (1) I wish to state as plainly as lies in my power what I understand was the decision in that case. At that date—1792—marriage did not of itself revoke a will, but marriage and the birth of a child did revoke a will. That was

(1) 5 T. R. 49; 2 R. R. 535.

a doctrine founded upon an implied intention of the testator. It was attributed to him that at the moment when he sat down to make his will he was presumed to say, "If my circumstances so alter that I marry and have a child, then I do not intend these dispositions to take effect, because I shall then owe other duties to my widow and to my offspring." That intention was attributed to the testator at the date at which he sat down to make his will. In *Doe* v. *Lancashire* (1) the question discussed was whether the will of a testator made before marriage, who died leaving his wife pregnant of a child which was afterwards born, was or was not revoked. Of course, it must have been either revoked or not revoked before his death—it could not be revoked six or eight months after his death, when the child was born. At the moment of his death his will must necessarily be either good or bad, although it might be impossible until a later date to say which it was. The question to be determined in *Doe* v. *Lancashire* (1) was, What happens in such a state of facts? The Court held that the will was revoked, and upon this ground, that when the event happened of the child being born alive—a fact which nobody could predicate at the date of the testator's death—that event took effect retrospectively, so that at the date of the testator's death it must be taken that there was a child because it turned out subsequently that a child was born alive. If that was the decision in *Doe* v. *Lancashire* (1), it appears to me that it governs the present case. I will read one or two passages from Lord Kenyon's judgment to shew what the law then was and to what it was being applied. Lord Kenyon says (2): "Without going into all those cases, it may now be taken for granted, because it has been solemnly decided, that marriage and the subsequent birth of a child amount to a revocation of a will made before marriage. Perhaps the foundation of that principle is not so much an intention to alter the will, implied from those circumstances happening afterwards, as a tacit condition annexed to the will itself at the time of making it, that the party does not then intend that it should take effect if there should be a total change in

(1) 5 T. R. 49; 2 R. R. 535. (2) 5 T. R. 58.

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the situation of his family. If those cases were referable to the head of a subsequent intention, the principle would be considerably distressed by the argument of Mr. B. Perrot in *Christopher and Christopher* (1), and by the circumstance of a conception not communicated to the husband, or of a miscarriage subsequent to his death; the latter of which might have some influence on the intention of the devisor, and yet would not operate as a revocation; and the former would have that effect, though it could not influence the intention." I pause for the purpose of pointing out exactly what Lord Kenyon means by that. He says that "the latter"—a miscarriage—"might have some influence on the intention." Obviously, what he means is, not that a miscarriage happening after his death—about which of course he could not know anything—could influence him, but that the fact of the pregnancy might influence him, and none the less because (as he could not know) it subsequently resulted in a miscarriage. That is to say, if the man had known at the date of his death that his wife was pregnant, it is quite probable that he would intend to alter his dispositions in some respect; but that, says Lord Kenyon, cannot operate as a revocation, because if there is a miscarriage and the child is not born alive, there is no revocation of the will. The other case—that of conception not communicated to the husband, but resulting in the birth of a child—would, says Lord Kenyon, have the effect of revoking. Yet it could not influence the testator's intention or affect his mind at all, because he did not know of the conception. Nevertheless, if there was conception and there was a subsequent birth the will would be revoked. In other words, it is quite plain from what Lord Kenyon says that the will is valid or invalid at the testator's death according to an event unknown to any one at the time, and is valid at his death by throwing back to that date the event, as it subsequently turns out.

Passing to the judgment of Buller J., he says (2): "The only question which remains to be discussed is, whether a

(1) See *Christopher* v. *Christopher*, (1771) Dick. 445. The "Mr. B. Perrot" is Mr. Baron Perrot, who differed in opinion from his brother judges.

(2) 5 T. R. 61.

child en ventre sa mère be or be not in the same situation as a child actually born. Though, when I say this, I do not forget the declarations which are stated in this verdict; to which I entirely concur with my Lord that no regard is to be paid. If there be any revocation at all of this will, it is so by presumption of law, independently of express declarations." But the point comes out most plainly, and, I think, quite clearly, in what Grose J. says at the foot of p. 63 of the report: "The objection which has been made against this is, that the will speaks from the devisor's death; and that it must be decided whether or not at that moment it be a valid will. I agree that it does speak from that time; but the instant the child is born, he is considered, by retrospect, as born during the parent's life." Now mark—directly the testator is dead, either the instrument is his will or it is not. That cannot be in suspense for six months. It is his will if no child is born alive; it is not his will if a child is born alive—an event which you cannot determine until a subsequent date. The Court therefore held that, inasmuch as at a subsequent date the child was born alive, the will ceased to be the will of the testator when he died, because it was revoked by the birth of the child subsequent to the will—an event which no human being could predicate at the moment of the testator's death. *Doe* v. *Lancashire* (1) involves absolutely this proposition—that if the child is subsequently born, you must take it that the event must be assumed to have happened, in the sense in which one speaks of a birth as happening before it takes place, at an earlier date. The cardinal point of course is, that the relevant event has happened at the earlier date, although you do not know that it has happened till the later date. *Doe* v. *Lancashire* (1), I think, decides the present case. I will go on to apply it presently, but before doing that I think I ought to say something about the subsequent cases, which are exceedingly interesting.

The next case to which I refer, although it is not quite in order of date, is *Blackburn* v. *Stables*. (2) I cannot help thinking that upon the question of remoteness—apart altogether from another question which has been argued, namely, whether

(1) 5 T. R. 49; 2 R. R. 535. (2) 2 V. & B. 367, 369; 13 R. R. 120.

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the case differs according to whether it would be for the benefit or the disadvantage of the child—this governs the present case. The gift there was to the son of A. at twenty-four, and if no such son, then to the son of B., and if neither of them had a son, then to the son of C., and then there were these words: "Nor shall my executors give up their trust till a proper intail be made to the male heir by him"—words the effect of which the Court held to be that the gifts so made to the son of A. and so on were gifts of estates tail to the persons named. It was argued that the gift was too remote. I cannot myself see any ground for the suggestion, except that the gift was at twenty-four—more than twenty-one. The rule as to remoteness might have been exceeded by reason of that fact. The report says that "The Master of the Rolls, on making the decree in the first instance in the plaintiff's favour, observed, that it is perfectly settled, that a child in ventre sa mère is to be considered as in existence for his benefit; and *Thellusson's Case* (1) went farther; where it was held, that such a child should be so considered to his disadvantage; those, who supported the will, relying upon the distinction, that for his advantage he was to be so considered." Now it seems to me that on the question of remoteness *Blackburn* v. *Stables* (2) must govern this case. It was a different ground there for applying the rule, but the question arose whether, by reason of the child being en ventre sa mère instead of born, the rule as to remoteness applied. The Master of the Rolls held that although the child was en ventre sa mère, the rule as to remoteness did not apply, and for the reason that the child was to be considered as born.

Following now the chronological order from which I departed to cite *Blackburn* v. *Stables* (2), the next case is *Doe* v. *Clarke* (3), which is not very close to the present case. It is only an authority for the proposition that, under a gift to such children of B. as shall be living at the time of his decease, a posthumous child of B. shares equally with those born in his lifetime—which is merely saying that the persons who are to take will be considered to include children en ventre sa mère

(1) 4 Ves. 227; 4 R. R. 205. (2) 2 V. & B. 367; 13 R. R. 120.
(3) 2 H. Bl. 399; 3 R. R. 430.

as being members of the class, who would otherwise be cut out and excluded from the benefit of the gift.

The next case in order of date is *Long* v. *Blackall* (1), which is very close to the present case, but distinguishable for reasons which, as Mr. Buckmaster suggested, are grounds for saying that it does not absolutely govern the present case. Nevertheless Lord Kenyon, in concluding his judgment, said: "It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation." That observation, if it be applicable, covers the present case. If I am right in saying that *Doe* v. *Lancashire* (2) throws the event back, then that is covered. The event must then necessarily happen. As Lawrence J. says in *Long* v. *Blackall* (1): "The devise over in this case must take effect, if at all, after a life which must be in being within nine months after the devisor's death." That is the same point again. If I am right in saying that the subsequent birth of a son is referable back to the death of the testatrix, then that sentence altogether applies.

The next case is *Thellusson* v. *Woodford* (3), which is to be found reported in its various stages, and I refer now only to the report in 4 Ves. 227, 334, where Sir Richard Pepper Arden M.R. says: "It remains then to be considered, whether a child en ventre sa mère is a life in being. I considered the case of *Long* v. *Blackall* (1) a complete decision upon that point." Then he says (4): "It must be admitted, that there is one case, in which to a certain extent a child en ventre sa mère is not considered to all intents and purposes as in existence. That is in the case of a descent at common law. Notwithstanding the statute, and that in every other case such child is considered as born from the time that the devise or limitation takes place, in that case the intermediate rents and profits, as in the case of *Basset* v. *Basset* (5), are declared to

(1) 7 T. R. 100, 102; 4 R. R. 73.
(2) 5 T. R. 49; 2 R. R. 535.
(3) 4 Ves. 227, 333, 337; 11 Ves. 112, 143, 150; 4 R. R. 205; 8 R. R. 104.
(4) 4 Ves. 335.
(5) (1744) 3 Atk. 203.

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belong to the heir-at-law." Then he goes on (1), in a passage which I need not read, to address himself to the case, which is not the present case, of an estate limited to all the sons of A. living at the death of the testator, for their lives, with remainder over. That only covers the present case if I am right in saying that upon the authority of *Doe* v. *Lancashire* (2) there was a male life in being at the death of the testatrix, and that the event of birth is to be referred back.

Thellusson v. *Woodford* (3) is to be found again reported in 11 Ves. 112, and at p. 143 Macdonald C.B., says: "The case of *Long* v. *Blackall* (4) seems to have decided, that an infant in ventre matris is a life in being. The established length of time, during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child."

Those are the authorities which, it seems to me, are the ground for my deciding the present case as I do. I only want to refer to Lord Westbury's decision in *Blasson* v. *Blasson* (5) for the purpose of shewing that it has very much less bearing. The expression there to be construed was "born and living at the time of my decease," that expression being used as the definition of a point of time. The gift was "when and so soon as the youngest of" certain children "who shall have been born and living at the time of my decease . . . . shall arrive at the age of twenty-one years," then to divide "among all such children of my nephew and of my nieces last named and described as shall be then living." Lord Westbury held that the class to take was a class to be ascertained at a date subsequent to the death of the testatrix, and that all children living at that date, the date for division, whether born before or after the death of the testatrix, were entitled. So that the words "born and living" were not relevant for the purpose of determining the persons to take, but only for the purpose of determining the point of time at which they were to take.

(1) 4 Ves. 336.
(2) 5 T. R. 49; 2 R. R. 535.
(3) 4 Ves. 227, 333, 337; 11 Ves. 112, 143, 150; 4 R. R. 205; 8 R. R. 104.
(4) 7 T. R. 100; 4 R. R. 73.
(5) 2 D. J. & S. 665.

Upon that latter point, after making various citations from the civil law, Lord Westbury came to the conclusion that, inasmuch as the words were relevant only for the purpose of ascertaining a period of time, and were not a description of the persons to take, the words "born and living at the time of my decease" might properly have, and ought to have, their strict meaning—that is to say, children actually born at that date to the exclusion of children en ventre sa mère at that date, with the consequence that the date of distribution arrived when the youngest of the children born at that date attained twenty-one, and not at the date when the youngest of the children en ventre sa mère at that date attained twenty-one. That decision is not relevant to the present question.

Then the other point which has been argued is this. It is said that this rule of treating a child who is not in fact born but only en ventre sa mère as being born is only applied when it is for the benefit of the infant to apply it. Thus stated, the proposition certainly is not correct: it must be modified at least to this extent, that if it is wholly immaterial to the child whether the rule is applied or not the child which is only en ventre sa mère is treated as being born. The decision of Chitty J. in *In re Burrows* (1) is to that effect. In that case there was a gift to B. "in case she has issue living at the death of A." There was no gift to the issue at all. At the death of A., B. was pregnant, and a child was subsequently born, and it was held that B. took. The child for the purpose of being considered as born was treated as being born, although it did not take, but somebody else took. So that you must add this—that the rule is applied, not only when it is to the advantage of the infant, but also when it is immaterial to the infant whether you apply or do not apply the rule. Then it is said that the rule ought not to be applied when it is to the disadvantage of the infant, but no authority is to be found for that proposition, and I am unable to see, looking at *Doe* v. *Lancashire* (2), how it is possible that that can be the true principle. In the case which arose in *Doe* v. *Lancashire* (2), it did not in the least matter what were the contents of the

(1) [1895] 2 Ch. 497. (2) 5 T. R. 49; 2 R. R. 535.

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will. Its contents might have been in favour of the after-born child, contemplating its possible existence; or they might have been adverse to the child, or they might have been totally immaterial to the child. For the purpose of the doctrine of *Doe* v. *Lancashire* (1) it does not matter what the will contained. If there was, after the execution of the will, a marriage of the testator and the birth of a child, the will was revoked utterly irrespective of what the will contained, and it was revoked, as it appears to me from the passages which I have read, not upon any doctrine of its affecting the child, but because it was contemplated that when the man originally sat down to make his will, when there was not in existence a marriage or a child, he was to be taken by implication to have intended that if circumstances altered he would make some other will—what other will does not matter at all—and the original will would be of no avail.

In my judgment, therefore, the doctrine in question—by which a child en ventre sa mère is to be treated as existing for many purposes—for all purposes other than descent at common law as regards rents during the intermediate period—is one which is applicable, not only where it is to the advantage of the child to apply it, or where it is immaterial to the child whether it is applied or not, but also where it is to the disadvantage of the child to apply it.

It appears to me that the doctrine is a general one, and that it is applicable to this particular case. What happened here was this. When the testatrix died there was in existence a fœtus, which turned out, when the birth resulted, to be a male child. That was a living thing at the date when the testatrix died. The limitation is perfectly good if that living thing is to be taken to have been at the date of her death that which it turned out to be.

I think that *Doe* v. *Lancashire* (1) decides that I must take it to be that which it turned out to be, and that, retrospectively, I ought to say that on October 28, 1880, Anna Maria Moore had a third son who could take, and, if so, the limitation is good. I therefore hold it to be good; and I declare that the

(1) 5 T. R. 49; 2 R. R. 535.

limitations over to the children of the plaintiff are good limitations.

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Solicitors for plaintiff and defendant R. K. Moore: *Evans, Foster & Wadham.*

Solicitors for trustee: *Tylee & Co.*

F. E.

In re WHITEFORD. INGLIS *v.* WHITEFORD.

BUCKLEY J.

1903

Feb. 21, 25.

[1902 W. 3744.]

Will—Gift of Residue subject to Annuity for Life—Advancement of Parts of Residue—Hotchpot—Interest—Period of Distribution.

W. had three sons, H., S., and B. On the marriage of H. in 1866 W. conveyed upon the trusts of H.'s marriage settlement real estate of the value of 4000*l.*, and by the settlement covenanted to pay 6000*l.* to the settlement trustees within six calendar months after the death of the covenantor. H. died before W.

W. died in June, 1893, having by his will, after giving certain legacies, and, to his wife, an annuity, given his residuary estate to trustees upon trust, as to one-third, for S., and as to another one-third for B. The remaining one-third was directed to be transferred to the trustees of H.'s settlement to be held upon the trusts thereof, but subject to the proviso that after payment of the 6000*l.* the sum of 10,000*l.* (the 6000*l.* plus the 4000*l.*) should be considered to have been received and advanced out of residue in respect of H.'s portion, and should, for the purpose only of ascertaining the amount of that portion, be considered as part thereof, and should be accounted for in the way of hotchpot accordingly.

On December 6, 1893, the trustees of the will paid the 6000*l.* to the settlement trustees. B. died in August, 1893, and under his will his widow was tenant for life. The trustees of W.'s will made payments of equal amounts from time to time (1.) to S. and (2.) to B. and the trustees of his will. Part of each sum was treated as capital, and the rest (of which half was paid to B.'s widow) as income.

On the death of W.'s widow in 1902 the sum set apart to answer her annuity fell into residue:—

Held, on the authority of *In re Rees*, (1881) 17 Ch. D. 701, *In re Dallmeyer*, [1896] 1 Ch. 372, and *In re Lambert*, [1897] 2 Ch. 169, (1.) that the date of distribution (notwithstanding the existence of the annuity) was the death of W., and that interest was chargeable on the advance made in his lifetime as from the date of his death and on advances made after his death, as from the date of those advances; (2.) that no

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distinction was to be made between the advances made on account of capital and those made on account of income in respect of the shares of S. and B.; (3.) that the rate of interest to be charged was 3 per cent. only.

In *In re Lambert* Stirling J. laid down a general rule as to the rate of interest chargeable. The opinion to the contrary of Joyce J. in *In re Hargreaves*, (1902) 86 L. T. 43, dissented from.

The report of *Hilton* v. *Hilton*, (1872) L. R. 14 Eq. 468, corrected.

CHARLES COBLEY WHITEFORD, by his will dated November 30, 1889, appointed certain persons his executors and trustees, and after giving a number of specific and pecuniary bequests and an annuity (increased by his codicil) to his wife for life, he gave his real estate and the residue of his personalty to his trustees upon trust for sale and conversion, and directed them to stand possessed of his residuary estate upon trusts expressed as follows: "As to one-third part of my residuary estate, which last-mentioned third part is hereinafter referred to as 'Hamilton's portion,' upon the trusts and subject to the provisions hereinafter expressed and contained concerning the same, as to one other third part of my residuary estate in trust for my said son Sidney Trefusis Whiteford, his executors, administrators, and assigns absolutely, and as to the other and remaining third part of my residuary estate in trust for my son Baldwin Keyaerto Whiteford, his executors, administrators, and assigns absolutely. Subject to the declaration and provision hereinafter expressed and contained concerning the same my trustees shall stand possessed of Hamilton's portion upon trust to pay, transfer, and assign the same to the trustees or trustee for the time of the" settlement executed on the marriage of Hamilton Whiteford, dated April 3, 1866, to be held upon the trusts of the settlement so far as the same should be then subsisting and capable of taking effect. "Provided always, inasmuch as upon the marriage of my said son Hamilton Whiteford with the said Florence Whiteford I settled" a freehold estate called Spirewell and a dwelling-house in Plymouth "upon certain trusts for the benefit of the said Hamilton Whiteford and his wife and children and other issue, and the property so settled was estimated at and I consider the same to be of the value of 4000*l.*, and upon such marriage I covenanted to pay within six calendar months after the decease of the

survivor of me and my said late wife the sum of 6000*l.* to the trustees of the settlement." "Now I declare that on and after payment of the said sum of 6000*l.* so secured as aforesaid the sum of 10,000*l.* shall be considered to have been received and advanced out of my residuary estate in respect of Hamilton's portion, and shall for the purpose only of ascertaining the amount or value of Hamilton's portion be considered as forming part thereof, and shall be accounted for in the way of hotchpot accordingly; but the last mentioned settlement shall not in any way prejudice or affect the trusts hereinbefore expressed concerning the other parts of my residuary estate or any of them, or any other gift, disposition, or provision contained in this my will."

The testator died on June 12, 1893, leaving a widow and two of his sons, Sidney T. Whiteford and Baldwin K. Whiteford, surviving him. Hamilton Whiteford had died in the testator's lifetime.

On December 6, 1893, the trustees of the will paid the 6000*l.* to the trustees of Hamilton Whiteford's settlement. Baldwin K. Whiteford died on August 30, 1893, and under his will his widow was tenant for life of the third share given to him by his father's will. The trustees of C. C. Whiteford's will from time to time made payments to Sidney T. Whiteford and Baldwin Keyaerto Whiteford (and the trustees of his will) in respect of these two sons' shares of residue.

The sums so advanced amounted to 6555*l.* 5*s.* 8*d.* in the case of each of those two sons up to the date of the death of C. C. Whiteford's widow, which occurred on September 27, 1902. Of each sum of 6555*l.* 5*s.* 8*d.* the sum of 5770*l.* 5*s.* 8*d.* was treated, as between payers and payees, as consisting of capital, and the sum of 785*l.* as consisting of income. One of these two amounts of 785*l.* had been paid to the widow of Baldwin K. Whiteford.

On the death of C. C. Whiteford's widow the capital sum set apart to produce her annuity became divisible as residue.

The surviving trustee of C. C. Whiteford's will took out an originating summons for an order declaring (1.) whether in distributing the testator's residue given to or for the benefit

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of his three sons the sum of 10,000*l.*, of which 4000*l.* was paid by the testator in his lifetime to Hamilton Whiteford's settlement trustees, and 6000*l.* was paid to them on December 6, 1893, with interest from that date or from any other and what date, and also all sums paid by the plaintiff to Sidney T. Whiteford and to Baldwin K. Whiteford's will trustees in respect of their shares of residue, with interest from the respective dates of such payment, ought to be brought into hotchpot; (2.) whether such interest as aforesaid ought to be calculated at the rate of 3 per cent. or 4 per cent. per annum.

H. M. Humphry, for the plaintiff.

F. Baden Fuller, for Sidney Whiteford and the trustees of Baldwin Whiteford. The residue must be so divided that the legatees may participate equally, and in order to do that interest must be charged on the advances—as regards Hamilton's advance of 4000*l.*, from the date of the testator's death: *Hilton* v. *Hilton* (1); *In re Rees* (2); *In re Lambert.* (3) The case last cited shews that the gift of the annuity makes no difference.

Four per cent. is the rate of interest to be charged: *In re Rees.* (2) It will be suggested that in *In re Lambert* (3) Stirling J. meant to decide that the rate has been altered, and therefore that 3 per cent. is now the proper rate; but in *In re Hargreaves* (4) Joyce J. said: "Nor do I think that Stirling J. in *In re Lambert* (3) did decide, or intended to decide, that the rate of interest to be debited on advances between the death of the testator and the period of actual distribution was to be 3 instead of 4 per cent. as formerly." *Hilton* v. *Hilton* (1) is not accurately reported. (5)

(1) L. R. 14 Eq. 468.
(2) 17 Ch. D. 701.
(3) [1897] 2 Ch. 169.
(4) 86 L. T. 43, 46.
(5) According to a note made by Mr. Baden Fuller, the order in *Hilton* v. *Hilton*, dated November 25, 1872, declared that all accumulations of the surplus income from the testator's residuary estate up to August 14, 1871, the day the youngest child attained twenty-one, referred to in the will as the "Common Fund," were to be treated as income and not capital; and that interest at 4 per cent. from the death of the testator to August 14, 1871, on advances made by the testator during his life, ought to be brought into hotchpot and accounted for by or on account of the shares of

Harman, for the trustees of Hamilton Whiteford's settlement. Interest on the advances is not payable as from the date of the testator's death, but from the period of distribution: *In re Dallmeyer.* (1)

The rate of interest is now only 3 per cent: *In re Goodenough* (2); *In re Lambert* (3); *In re Barclay* (4); *Rowlls* v. *Bebb.* (5)

At any rate the 4000*l.* should only be charged with interest as from December 6, 1893, when the sum of 6000*l.* was paid, because it is only as from that date that the testator has declared that the 10,000*l.* is to be considered as received.

BUCKLEY J. (after stating the facts). What is the proper way to proceed in order to produce equality? Ought Hamilton to be charged with interest on the 4000*l.* as from the testator's death and on the 6000*l.* as from December 6, 1893, or ought he to be charged with interest on both sums as from December 6, 1893?

The former is the right way to proceed unless the will points out another way, and it does not. Hamilton must be charged with interest on the 4000*l.* advanced in his father's lifetime as from the date of his father's death, and with interest on the 6000*l.* as from December 6, 1893. Then what is to be done as to the sums paid in respect of Sidney's share and Baldwin's share? It is argued that as each received a sum of

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such children in the common fund, and that the principal of such advances ought to be brought into hotchpot and accounted for by or on account of the shares of such children respectively in the capital of the residuary estate when the same should come to be divided; and that all advances or sums paid by the plaintiffs since the testator's death by way of advancement with interest at 4 per cent. from the respective times of advances of the same respectively, ought to be brought into hotchpot and accounted for by or on account of the respective shares in the said common fund; and that all sums paid by the plaintiffs since the testator's death by way of allowance or maintenance to or on behalf of the said children ought (but without interest) to be brought into hotchpot and accounted for by or on account of the respective shares in the common fund.

(1) [1896] 1 Ch. 372.
(2) [1895] 2 Ch. 537.
(3) [1897] 2 Ch. 169.
(4) [1899] 1 Ch. 674.
(5) [1900] 2 Ch. 107.

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money it ought to be ascertained what part was capital and what part was income, and that interest should only be charged on the portion which is capital.

That is not the rule upon which the Court acts.

In re Rees (1), *In re Dallmeyer* (2), and *In re Lambert* (3) shew that the working rule adopted by the Court is to ascertain the date of distribution (which is here the testator's death), and as a matter of calculation, and not for the purposes of payment, to charge interest from the date of the testator's death on advances made in his lifetime, and on advances made after his death to charge interest from the date when the advance was made. By so doing you work out equality amongst the children. Here the date of distribution is the testator's death. It is an immediate gift on his death, and not the less so because there is an annuity and the estate is increased by the falling in of the annuity when the annuitant dies. If you worked out the matter with technical accuracy, I agree that, as each child receives a payment at a date subsequent to that at which payment has been made to another child, you ought on each occasion to distinguish between capital and income, and have yearly rests and charge compound interest, as Rigby L.J., pointed out in *In re Dallmeyer*. (4) He says: "It would seem, therefore . . . . that the share to which an advanced child or his issue may be entitled in expectancy is to be treated as diminished by the amount of the advance as from the date when the advance is taken or made. The strict rights of the children, on this view of the will, would be worked out by a declaration that, as between the children, the accumulations from time to time of residue are to belong to them in the same proportions in which they are for the time being entitled in expectancy to the corpus including past accumulations, with consequential directions. To give effect to this, rests would have to be taken at the end of each year as to the younger children's advances, and at the dates of the actual advances to Sidney with regard to his advances. The result would give to each child the

(1) 17 Ch. D. 701.
(2) [1896] 1 Ch. 372.
(3) [1897] 2 Ch. 169.
(4) [1896] 1 Ch. 395.

exact part of the accumulations earned by his expectant share for the time being. After the period of distribution a charge of interest on the value of the business and on the advances would have to be made, and, as the accumulations of residue have still continued, 4 per cent. interest might be charged." But that was not the course adopted by the Court of Appeal in *In re Dallmeyer*. (1)

In *In re Lambert* (2) Stirling J. said: "Now the rule adopted down to the case of *In re Rees* (3) was that, for the purpose of securing equality in the account between the parties —because, of course, there is no question of any payment being made by the advanced party—you must charge the person advanced with interest on the advance." Then he notices, but does not follow, what Rigby L.J. said in *In re Dallmeyer* (1), and says: "I think I must adhere to the rule which is laid down in all the cases down to that of *In re Dallmeyer*." (1)

The rule comes to this—that you do not enter upon an exact calculation of what would be the rights of children with yearly rests and compound interest, but adopt a more rough and ready rule. You take each payment as having been made on account of a share and charge interest on that, and that is considered sufficient equality. Here Hamilton's share ought to be debited with interest on the 4000*l*. from the date of the testator's death, and the advance of 6000*l*. and the advances on the other shares ought to be debited with interest as from the date of each advance.

Then what is the rate of interest to be charged? The principle, I apprehend, is that when one person is paid before another you charge him with interest at the rate which you apprehend he would have obtained if he had had the money and invested it. In ascertaining what that rate is, you ought to give him the credit of being a person of reasonable prudence and caution and not a rash investor. The reasonable rate to be charged is that which he could command by making an investment without undue risk. The recipient of the advance is not to be treated as a wrong-doer or as a person

(1) [1896] 1 Ch. 372. (2) [1897] 2 Ch. 169, 176, 180.
(3) 17 Ch. D. 701.

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who will not act with reasonable prudence. It seems to me that 3 per cent. is the rate which ought to be charged. The rule as to 3 per cent. has been followed in several cases—in *In re Goodenough* (1), in applying the rule in *In re Earl of Chesterfield's Trusts* (2); in *In re Barclay* (3), in charging trustees with sums received and retained by them; and in *Rowlls* v. *Bebb* (4), as between tenant for life and remainderman.

In *In re Rees* (5) 4 per cent. was the rate allowed; but Stirling J. in *In re Lambert* (6), referring to *In re Rees* (5) and the 4 per cent. rate, says (7): "Now, at the time of the decision of *In re Rees* (5) that rate of interest had been adopted by the Court of Chancery as representing the average rate of interest payable in respect of investments such as trustees were authorized by the Court to invest in; it is also a rate of interest which is charged according to the rules on debts which are provable in administrations, and as to which there is no special provision as to their bearing interest. The rule as to the interest payable on debts has not yet been altered, and that remains the rate at which interest is charged on debts; but as regards other applications of the rule charging 4 per cent., it has in recent times been thought that it is excessive, inasmuch as in these days trust investments do not yield anything like 4 per cent., and several judges, I think North J. and Kekewich J. particularly in the number, have under circumstances such as these said that only 3 per cent. ought to be charged." It is true that in that case (8) no one desired that more than 3 per cent. should be charged, but Stirling J. decided on that rate on principle as being the rate of interest adopted by the Court. I think that was a decision, and that the judge meant to lay down a rule. In *In re Hargreaves* (9) Joyce J. is reported to have expressed the opinion that Stirling J. did not intend to lay down any general rule. I regret I am unable to agree with the learned judge in that opinion. I think that

(1) [1895] 2 Ch. 537.
(2) (1883) 24 Ch. D. 643.
(3) [1899] 1 Ch. 674.
(4) [1900] 2 Ch. 107.
(5) 17 Ch. D. 701.
(6) [1897] 2 Ch. 169.
(7) Ibid. 180.
(8) Ibid. 173.
(9) 86 L. T. 43, 46.

Stirling J. did intend to lay down a general rule that 3 per cent. is the rate to be charged, and that I ought to follow it.

My attention has been called to *Hilton* v. *Hilton* (1), and it has been pointed out that the report of that case is not accurate. Malins V.-C. is reported to have said (2): "I am of opinion that the proper mode of dealing with the will is, that the children must bring into account all sums which may have been received by them either by way of advances from the testator, or subsequent maintenance or advancements, and with interest from the death of the testator in the case of payments made in his lifetime, and in the case of payments made subsequently, from the time of their being made," whereas the order as drawn up only charges interest on advances made by the testator in his lifetime and advances made by way of advancement, but not upon advances made by way of maintenance. I do not think that *Hilton* v. *Hilton* (1) decides anything inconsistent with what I have decided.

Solicitors for all parties: *Gribble, Oddie, Sinclair & Johnson.*

(1) L. R. 14 Eq. 468. (2) L. R. 14 Eq. 476.

F. E.

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Feb. 25, 26.

In re D'ESTE'S SETTLEMENT TRUSTS. POULTER *v.* D'ESTE.

[1902 D. 1931.]

Conflict of Laws—Power of Appointment—Personalty—Execution—Domiciled Foreigner—Unattested Will—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 9, 10, 27.

Sect. 27 of the Wills Act, 1837—as to general devises and bequests operating as execution of general powers of appointment—is a rule of construction which attributes to a will a meaning which but for the section it would not have, and which is applicable only to those documents as to which the Courts of the United Kingdom (other than Scotland) are the Courts of construction.

Therefore, where under an English settlement there is a general power to appoint personalty by will, the power is not exercised by the will of a domiciled foreigner, valid by the law of her domicil, but not attested as required by the Wills Act, containing a general bequest of personalty, but not using words introducing the statutory rule of construction.

In re Price, [1900] 1 Ch. 442, distinguished.

On the marriage of Baron D'Este, who then was and always remained a French subject domiciled in France, with Alice Drake, then a British subject domiciled in England (which marriage was solemnized on August 18, 1874), a settlement was executed dated August 17, 1874. By the settlement certain funds entirely consisting of personalty (which the Baroness had transferred to the trustees of the settlement) were settled upon trust to pay the income to the Baroness during the joint lives of herself and the Baron, and after the death of either to pay the income to the survivor, and after the survivor's death for the issue, if any, of the marriage. And it was by the settlement declared that if there should be no issue of the marriage the funds should, after the Baron's death and such failure of issue, be held "in trust for such person or persons and such purposes" as the Baroness should "during coverture by will or codicil . . . . appoint, and in default of appointment and so far as no such appointment should extend," then, if the Baron should survive the Baroness, "in trust for such person or persons as, under the statutes for the distribution of the

effects of intestates, would have become entitled thereto at the death of" the Baroness "had she died possessed thereof domiciled in England intestate and without having been married."

There never was any issue of the marriage, and the Baroness, who became by her marriage and thereafter remained a domiciled Frenchwoman, died on February 17, 1902, in the Baron's lifetime, having made a holograph will, in French form, and unattested (1), of which the following is a translation: "I, the undersigned Alice Drake, wife of Baron Arthur Smyth D'Este, residing at Billere, declare that I wish to make my will as follows: I appoint Baron D'Este, my husband, my general and universal legatee. I consequently bequeath him all the personal and real [*sic*] (2) property that shall belong to me at my decease and shall compose my estate. He shall enjoy and dispose of the same absolutely as from the day of my death. In the event of there being children of our marriage, I leave and bequeath to my husband, in conformity with the law, one-fourth in ownership and one-fourth in enjoyment, with exemption from giving security. I revoke and annul every and any other will, desiring that the present alone shall be carried out. Made at Billere, and written out in its entirety in my own hand on the twelfth day of September, 1876. (Signed) Alice Drake, Baroness D'Este."

Letters of administration cum testamento annexo were in August, 1902, granted to the Baron by the Probate Division of the High Court of Justice.

An originating summons was issued by two of the trustees of the settlement, for the determination of the question whether the general testamentary power of appointment given thereby to the Baroness had been effectually exercised by her will.

Ingpen, K.C., and *Ashworth James*, for the plaintiffs. Either the Baron takes the property absolutely, or, if the will does not operate as an appointment, the property goes to the next of kin of the Baroness according to English law.

(1) Code Civ. 969, 970.

(2) The original words were "tous les biens meubles et immeubles."

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Astbury, K.C., and *F. A. Milne*, for the Baron. The power has been effectually exercised by the will: Wills Act, 1837, s. 27; *D'Huart* v. *Harkness* (1); *In re Price.* (2)

[BUCKLEY J. referred to Dicey on Conflict of Laws, p. 695: "Except, however, in the cases in which the construction of a will is governed by an absolute rule of law, the maxim, that the terms of a will should be construed with reference to the law of the testator's domicil, is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country."]

Sect. 27 of the Wills Act says that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." If that section applies, then the general bequest under this will exercises the general power, subject to the question whether, under s. 10 of the Act, the will, in order to be a good appointment in exercise of the power, must be executed and attested as required by s. 9 of the Act.

It is submitted that ss. 9 and 10 need not be complied with if, as in this case, the document operates as a will: *In the Goods of Joys.* (3)

[BUCKLEY J. In Theobald on Wills, 5th ed. p. 44, that case is treated as overruled. Kay J. refers to it in *In re Kingdon.* (4)]

The law of domicil is only material for seeing whether the document is good as a will. This document is good as a will, and has been admitted to probate here. If there are restrictions in the law of domicil, as to the exercise of a power, they will be disregarded by English law on the question whether the power

(1) (1865) 34 Beav. 324.
(2) [1900] 1 Ch. 442.
(3) (1860) 4 Sw. & Tr. 214.
(4) (1886) 32 Ch. D. 604, 610.

has been exercised: *Pouey* v. *Hordern.* (1) In *Barretto* v. *Young* (2) the reason why the foreign will was not a good exercise of the power was that it was not executed with the special formalities required by the instrument creating the power. *Van Grutten* v. *Digby* (3) shews that the English Courts have not shewn any undue desire to import foreign law so as to apply it to English settlements. There is no such thing as a power of appointment in French law, but the French will shews an intention to exercise the power, and is a good exercise of the power.

[They also referred to *De Nicols* v. *Curlier* (4); *In the Goods of Alexander* (5); *In the Goods of Earl* (6); *Bremer* v. *Freeman.* (7)]

Buckmaster, K.C., and *Maugham*, for some of the next of kin. The will is not an exercise of the power. It is not within s. 27 of the Wills Act. The bequest in that section must be by such a will as is contemplated by the Act, namely, a will executed in accordance with s. 9, and s. 10 shews that to exercise a power the will must be executed in the same way. In *In re Price* (8) there was something which amounted to a declaration by the testatrix that she meant her will to operate as her last will in England as well as in France. There is no such declaration here, and the property is not appointed, but belongs to the next of kin of the Baroness in default of appointment.

Method, for another of the next of kin, supported the same view.

Astbury, K.C., in reply.

BUCKLEY J. By a settlement executed on August 17, 1874, on the marriage of the Baron and Baroness D'Este, certain personal property of the Baroness was settled upon trust to pay the income to the Baroness during the joint lives, and after the death of either to the survivor for life, and after the death

(1) [1900] 1 Ch. 492.
(2) [1900] 2 Ch. 339.
(3) (1862) 31 Beav. 561.
(4) [1900] A. C. 21.
(5) (1860) 29 L. J. (P.) 93.
(6) (1867) L. R. 1 P. & M. 450.
(7) (1857) 10 Moo. P. C. 306.
(8) [1900] 1 Ch. 442.

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of the survivor to hold the trust funds and income in trust for the issue of the marriage in a certain way, and it was provided that if there should be no issue of the marriage the trustees should hold the capital and income of the trust funds in trust for such person or persons as the Baroness should during the coverture by will or codicil, or when not under coverture by deed with or without power of revocation and new appointment or by will or codicil, appoint, and in default of appointment over. The Baron D'Este was a domiciled Frenchman, and the lady on her marriage became a domiciled Frenchwoman. She died on February 17, 1902, and she left a will expressed in the French language, valid according to the French law, but not valid according to English law, as it was an unattested document. The effect of it was that she gave everything to her husband, but in the event of there being children of the marriage she gave him one-fourth and the use in trust of another fourth.

There were no children of the marriage, and the result was that on the death of the Baroness the general power of appointment existed. The question I have to decide is whether by her French will she has exercised that power.

In the first place it is plain that where an English instrument contains a power exercisable by will that power may be exercised either by a will executed in accordance with the law of this country or by any instrument recognised by the law of this country as being a will. A will executed by a domiciled foreigner according to the law of his domicil is in this country recognised as a valid will although not executed in accordance with the law of this country. Accordingly, the will of this French lady is a valid will, and, as such, has been admitted to probate. The question, then, is whether that will has exercised the power. The will refers neither to the power nor to the property, and unless this French will can have the benefit of s. 27 of the Wills Act it cannot be contended that it exercised the power. The question, therefore, resolves itself into this: Is s. 27 available?

In the first place it will be noticed that for the purpose of such a will as this you must exclude ss. 9 and 10 of the Wills

Act, otherwise the document would be no will. According to s. 9 a will must be attested by two witnesses. This will was not attested at all. According to s. 10, to exercise a power to appoint the document must be executed in the manner required for the execution of a will. The will of the Baroness has not been so executed, and therefore if ss. 9 and 10 apply it is not a will, and not an execution of the power. But it is said that although ss. 9 and 10 are excluded (as they are plainly by reason of the fact that our law recognises a will not executed according to our law, but executed according to the law of the domicil), nevertheless to such a will as that s. 27 is applicable. It appears to me that is not so. As I understand it, s. 27 of the Wills Act is a rule of construction. It is a section requiring you, when reading a will, to attribute to its language a meaning which but for that section it would not bear. It is a rule, of construction applicable to documents as to which this Court is the Court of construction. What would be the Court of construction to determine the effect of this French will? This being a foreign instrument, executed by a foreigner in her domicil, primâ facie it would have to be considered according to the law of the domicil. That is not, indeed, disputed. But it is said, and said truly, that where you have a power exercisable by will, the thing which you look at must no doubt be a will, otherwise it is not an exercise of the power; but that, when you have got it and read it, it takes effect not as a will—because ex hypothesi the property does not belong to the testator—but operates under the settlement containing the power. That is true.

Then it is said that I must take this French document and read it, not as a will in the sense in which I have explained, but as if the directions contained in it were introduced into the instrument which contained the power. That is quite right: but how must I read it? I have, referentially, to introduce into the instrument which contains the power a foreign document. I have to see whether the power was exercised, and therefore to find out the meaning of what is expressed by the donee of the power. Now how am I to ascertain the meaning of the donee of the power? I must

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ascertain it according to the law of the place applicable to the document executed by the donee, and to the domicil of that person, and that law is to be taken as the law governing its construction. If I do that, I have to read the French will and say what its meaning is according to the principle of French construction, excluding, therefore, s. 27, which is a rule for English construction.

The evidence as to French law is that powers of appointment are unknown in France. If a Court of construction in France were to read this document for the purpose of determining its effect as regards this power, it would have to be informed by evidence what a power of appointment is in our law; and, having learned what it is, it would have to apply the proper principles of construction in France to ascertain whether or not this property passed under the instrument. Sect. 27, which is a rule of construction here and not there, as it appears to me, would have no place in the discussion. You may state the proposition in either one of two ways. Sects. 9 and 10 of the Wills Act must be excluded, otherwise this is not a will at all. If you exclude those sections, you exclude them because, although they form part of the Wills Act, they do not apply to such a will as this. Upon similar grounds you must exclude also s. 27. Or you may state the proposition in the other form—that in a French Court the rule of construction under s. 27 is not a rule at all.

I have thus discussed the matter upon principle; but the point is really governed, I think, by the decision of Stirling J. in *In re Price.* (1) I do not propose to deal with any of the earlier authorities; the learned judge went through them in that case. As I understand the decision in *In re Price* (1), Stirling J. decided in the first place that a will valid according to the law of the domicil is a valid will for the purpose of a power contained in an English instrument giving power to dispose of property by will; and, secondly, that inasmuch as that will contained the words, "It shall thus be considered in England the same as in France," the testatrix had said, or must be taken to have said, "You are to read this instru-

(1) [1900] 1 Ch. 442, 452, 453.

ment—that is, this my will—upon those principles of construction which would be applicable in England to a will." If she had said so, she would have said, "For the purpose of this my will you are to take it that I am meaning to dispose not only of my property, but also of that which I can appoint under a power; in other words, I mean you to introduce s. 27 of the Wills Act into my will." In the absence of that, as I understand the learned judge, he would have arrived at a contrary conclusion. If there had not been words to introduce the English rule of construction, he would have come to the conclusion that the will did not exercise the power. He says, upon this last point, that it is a question of construction. "In general," he says, "a will is to be construed according to the law of the domicil of the testator." And then he cites from Dicey on Conflict of Laws, p. 695, this passage: "But this is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country." As to that the learned judge proceeds to say that there is in the will before him something to shew that the testatrix wrote it with reference to the law of England, because she had said it should thus be considered in England the same as in France. He says: "I think it is indicated upon the face of the will that she wrote it with reference to the law of England as well as the law of France. Therefore I think that I am entitled to apply the rules of construction which would by English law be applied." And he applies this rule; but I think in the absence of those words he would not have done so.

I hold, therefore, that this lady's will did not exercise the power, and declare that the testamentary power given by the settlement was not exercised by the will of the Baroness.

Solicitors for applicants: *Nicholl, Manisty & Co.*

Solicitors for Baron D'Este: *Burne & Wykes.*

Solicitors for next of kin of Baroness D'Este: *R. C. M. Poulter; Bolton & Co.*

F. E.

BUCKLEY J.

1903

March 27.

In re JENNINGS, A SOLICITOR.

[1903 J. 53.]

Manor—Lord of the Manor—Steward—Solicitor—Custody of Court Rolls.

Both the lord of a manor and the steward have a qualified right to the custody of the court rolls. The steward is entitled to keep them for the purpose of discharging the duties of his office; and there is no rule that the lord is entitled as of right, in the absence of misconduct, to call upon the steward to give them up to him.

The decision in *Rawes* v. *Rawes*, (1836) 7 Sim. 624; 5 L. J. (N.S.) (Ch.) 114; 40 R. R. 191, must be understood as addressed to a case where the steward had misconducted himself.

ADJOURNED SUMMONS.

On November 8, 1898, John Dickson, the lord of the manor of Beverley Water Towns, in the county of York, by deed-poll granted to W. E. H. Jennings, a solicitor practising in London and Driffield, the office of steward of the manor, to hold the same and take the fees thereto belonging by himself or his deputy for and during the natural life of him the said W. E. H. Jennings, provided he should so long well and faithfully demean and behave himself in his said office.

By his will dated January 3, 1899, John Dickson devised the manor to W. E. H. Jennings and A. J. Wise and their heirs to the use of A. J. Wise during his life without impeachment of waste, with remainder to his first and other sons in tail male, and appointed Jennings and Wise his executors.

The testator died in 1899. Wise, who was himself a solicitor, came into possession of the manor, and Jennings continued to act as steward. In November, 1902, Wise came to the conclusion that it was advisable that he should himself have the custody of the court rolls of the manor, delivering them up to the steward when he required them for the discharge of his duties; and he called upon Jennings to give them up. Jennings refused to do this, and Wise took out a summons intituled, "In the Matter of W. E. H. Jennings, a solicitor," asking that Jennings might be ordered to forthwith deliver (upon oath, if

required) to him as lord of the manor all the court rolls of the manor and other documents relating thereto.

Shortly after the testator's death Jennings had handed over to Wise the title-deeds of the property; no suggestion was made that he had in any way misconducted himself or failed to discharge his duties as steward, and the whole of the evidence was directed to the question whether it would be more convenient that the court rolls should remain at Driffield, or should be kept by Wise or his solicitors at Beverley.

No question was raised as to the form of procedure.

T. L. Wilkinson, for the summons. The evidence shews that it would be more convenient for all parties that the court rolls should be kept at or near Beverley instead of at Driffield. But, apart from that, the lord of the manor is entitled as of right to the custody of the court rolls: *Rawes* v. *Rawes*. (1) It is true that in *Windham* v. *Giubilei* (2) Bacon V.-C. refused to order a steward to deliver up the court rolls; but that was on the ground that the lord was an infant suing by his guardian ad litem, and had not himself elected to put in force his absolute right. Those are the only cases which are directly in point. There are other authorities, which would have been relevant if the respondent had taken any objection to the form of procedure; for instance, *Ex parte Grubb* (3) and *Hughes* v. *Mayre*. (4) No doubt the steward is entitled to the use of the court rolls for the purposes of his office, and to that extent the lord cannot interfere with him; but he only wants them occasionally, and the lord is entitled to keep them during the rest of the year.

Austen-Cartmell, for the respondent. The steward does not claim any title to the court rolls, but he contends that he is the proper person to keep them. His office is a necessary incident of the manor; he holds it for life, and has judicial duties to perform which render it necessary that he should retain the deeds. *Windham* v. *Giubilei* (2) shews that the lord

(1) 7 Sim. 624; 5 L. J. (N.S.) (Ch.) 114; 40 R. R. 191.
(2) (1871) 40 L. J. (Ch.) 505.
(3) (1813) 5 Taunt. 206; 14 R. R. 743.
(4) (1789) 3 T. R. 275.

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has no absolute right to the custody of the court rolls, and it is treated as an authority in Elton's Law of Copyholds, 2nd ed. p. 314, and Scriven on Copyholds, 7th ed. pp. 431, 432. The decision in *Rawes* v. *Rawes* (1) is not supported by the authorities which were cited, and the rule is not stated so broadly in the report in 5 L. J. (N.S.) (Ch.) as it is in 7 Sim. Shadwell V.-C. really decided it on the ground of the misconduct of the steward. It is not correct to say that the steward is the servant or agent of the lord. As judge of the Court Baron he has important duties to perform towards the copyholders as well as to the lord. The point is also mentioned in *Ex parte Corpus Christi College* (2), *North Western Ry. Co.* v. *Sharp* (3), and *Cocks* v. *Harman.* (4)

T. L. Wilkinson, in reply.

BUCKLEY J. stated the facts, and proceeded:—The only point I have to decide is whether the lord of the manor is as of right entitled against the steward of the manor to have possession of the court rolls. Looking at the question on principle, what strikes me in the first instance is this. The lord is a person who is unquestionably entitled to have the custody of the court rolls, but not for himself solely. In *Rex* v. *Tower* (5) Lord Ellenborough said that as regards the court rolls the lord is a trustee and guardian of the evidence of the tenants' rights. The steward is in a sense the servant of the lord; but he is not a mere servant: he holds a judicial office, and is unquestionably entitled to possession of the rolls for the purposes of executing his duties as steward. The lord cannot refuse to let him have them for the purposes of his office; the lord's rights are, therefore, qualified rights. The rights of the lord are in a sense paramount rights, but they are subject to the steward's right to have the rolls under circumstances and for certain purposes. The steward thus has in a sense rights paramount to those of the lord, and both the lord and the

(1) 7 Sim. 624; 5 L. J. (N.S.) (Ch.) 114; 40 R. R. 191.
(2) (1815) 6 Taunt. 105.
(3) (1854) 10 Ex. 451, 453.
(4) (1805) 6 East, 404; 8 R. R. 505.
(5) (1815) 4 M. & S. 162; 16 R. R. 428.

steward are trustees for the tenants of the manor. In that state of things, where the steward properly performs the duties of his office, has the lord any absolute right to come to him and say, "Deliver up the court rolls to me"? In my opinion he has not. I must refer to the authorities, and in particular to one: *Rawes* v. *Rawes* (1), before Shadwell V.-C., in which the decision, if his language is to be understood in the wide sense in which it is reported in 7 Sim. at p. 626, would compel me to decide this case in favour of the lord. I do not think it can be so understood.

In the first place, there is the case of *Hughes* v. *Mayre*. (2) In that case Hughes, the lord of the manor, was going abroad and wanted to see the court rolls and deeds belonging to the estate, and called upon Mayre to shew cause why he should not deliver them to him; it appeared that Mayre had been steward for a former lord of the manor, and had been continued in the employment of Hughes. It does not appear that Mayre had any fixed tenure of the office of steward. I gather that he had not, and that Hughes was minded to appoint his own steward, and for that reason asked for the court rolls. Mayre did not dispute the claim, but said that he had a lien on the documents, and that a third person was interested in them. The Court ordered Hughes to pay 300*l.* into court, and thereupon ordered that the steward, or, as I read it, the late steward, should hand over the court rolls. That was the whole case. It did not lay down any general proposition. It did not determine that the lord had an absolute right to an order that the steward should hand over the court rolls to him.

The next authority is *Ex parte Grubb*. (3) That is quite a plain case. The lord had dismissed one steward and appointed another, and the decision was merely that the late steward had no right to retain the court rolls. No cause being shewn, the rule was made absolute. Then, in 1815, came the case of *Ex parte Corpus Christi College* (4), which is to the

(1) 7 Sim. 624; 5 L. J. (N.S.) (Ch.) 114; 40 R. R. 191.
(2) 3 T. R. 275.
(3) 5 Taunt. 206; 14 R. R. 743.
(4) 6 Taunt. 105.

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same effect. A Mr. Fry had been employed as steward, and an application was made that he should be ordered to give up the court rolls. The Court, after some hesitation on a question of jurisdiction, granted a rule nisi to the whole extent prayed. The rule required him to pay interest on rents which he had detained, and it was argued on that point; but it was simply a case where the lord enforced his right against his late steward.

That being the position of the authorities, the case of *Rawes* v. *Rawes* (1) came before Shadwell V.-C. There are two reports of the case, and from that in 5 L. J. (N.S.) (Ch.) 114 it appears that the suit had been instituted to have the trusts of a will carried into execution under which infant plaintiffs were lords of the manor. The report in 7 Sim. 624 states that a solicitor who had been employed as steward had been guilty of negligence, had been adjudicated a bankrupt, and had been in gaol. In other words, it was a case of a steward who had been guilty of misconduct and was not to be trusted with the documents. The cases of *Hughes* v. *Mayre* (2) and *Ex parte Grubb* (3) were referred to, and the Vice-Chancellor, as reported in 7 Sim. at p. 626, says this: "Nothing in the nature of decision, has been cited to me to shew that the right to hold the court rolls is in the steward as against the lord. In the cases referred to in support of the petition, the only doubt that the judges entertained, was whether they had jurisdiction to order, in a summary way, an attorney to deliver deeds to his client: and, finding that they had that jurisdiction, they take it for granted that they had authority to compel the steward, as an attorney, to deliver up the court rolls to the lord." Then follows this sentence: "The lord has, as of right, the custody of the court rolls; and though they ordinarily remain in the custody of the steward, he holds them only as servant or agent to the lord." In the report of the case in 5 L. J. (N.S.) (Ch.) 114 the Vice-Chancellor is reported to have said: "I have heard nothing which can lead me to a decision, that the right to hold the court rolls of a manor is in the steward, as against the lord.

(1) 7 Sim. 624; 5 L. J. (N.S.) (Ch.) 114; 40 R. R. 191.

(2) 3 T. R. 275.

(3) 5 Taunt. 206; 14 R. R. 713.

I was very much struck with the boldness of this proposition: it struck me as something new." He is addressing himself to the case of a steward who has misconducted himself and tries to keep the rolls as against the lord. Later on he says: "In *Hughes* v. *Mayre* (1), Lord Kenyon, and the Court of Common Pleas, took it for granted that the lord of the manor had a right to compel the steward to give up the court rolls: and my opinion certainly is, that the lord of the manor has himself a right to the custody of the court rolls, and though they frequently remain in the hands of the steward, that is only as a matter of convenience, and he holds them as the servant of the lord."

The Vice-Chancellor was I think there addressing himself to the question of the rights of the lord as against a steward who had been guilty of misconduct, and whom the lord was entitled to remove, and he relies on *Hughes* v. *Mayre* (1), which, as I have pointed out, was not a decision upon so broad a proposition as the Vice-Chancellor's words literally read would seem to cover. I do not think he intended to lay down any broad general proposition. His decision only involves the principle that if a steward has misconducted himself the lord has a right as against him to say that he shall keep the rolls no longer, but shall hand them over to him.

The next decision is one of Bacon V.-C.—*Windham* v. *Giubilei* (2)—and, unless Shadwell V.-C.'s judgment in *Rawes* v. *Rawes* (3) is understood as I have explained it, these two cases appear to me to be inconsistent the one with the other. There there was a summons by the guardian ad litem of an infant lord to compel the steward to deliver up the court rolls of the manor to the receiver of the rents and profits appointed in the suit. If there had been any such right in the lord as the broadness of Shadwell, V.-C.'s language suggests, that order must have been made. It was an application by the lord for an order that the steward should hand over the court rolls. Bacon V.-C. says: "I think that this application is misconceived altogether. There is a steward of the manor validly

(1) 3 T. R. 275.
(2) 40 L. J. (Ch.) 505.
(3) 7 Sim. 624; 5 L. J. (N.S.) (Ch.) 114; 40 R. R. 191.

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appointed (as appears by the evidence, which is uncontradicted), though not appointed by deed, and although his last appointment was made by General Windham, who, as is said, had only a limited estate, Sir William Forster is de facto the steward of the manor. Certain duties have to be discharged by him for the neglect of which duties he would unquestionably be responsible to this Court beyond all doubt, and perhaps to others. He cannot discharge those duties without the possession of the books, the court rolls, and so on, mentioned in the first part of this summons, and no case has been suggested why he should be removed from his office. If any such case exists, or if it is thought expedient to remove him, that application must also contain a suggestion of who ought to be steward, because the Court will not displace one steward without seeing that there is another to perform his functions. I do not agree with Mr. Everitt at all, when he says that the receiver is the man who is to be steward of the manor or hold the manor courts. If there is a case to remove Sir W. Forster from his office of steward, let that be properly brought forward in the proper way, and the Court will know what to do with it: in the meantime the court rolls seem to be in the proper custody" (i.e., as against the lord who is seeking to have them delivered to him). "It is not suggested that any improper use will be made of them. The case does not bear the slightest resemblance to the case cited from the 7th of Simon's Reports, where the misconduct of the steward, or the qualification of the steward, formed a principal feature, though perhaps not the only reason for the decision there pronounced." I have travelled through the authorities, and I desire to read this passage from Elton's Law of Copyholds, 2nd ed. p. 314, which seems to me to be right: "With regard to the custody of the court rolls, the general rule seems to be that the steward is entitled to the possession of the court rolls, as he has certain duties to perform which he cannot properly discharge without possession of the rolls, and for the neglect of which he would be responsible. But as the lord is, in respect of the court rolls, 'a trustee and guardian of the evidence of the tenants' rights,' it seems that the steward is not entitled to hold the

rolls as against the lord, and if there is proof of any improper conduct on the part of the steward, the Court will order the rolls to be delivered to the lord, but if there is no suggestion of misconduct, the Courts will not deprive the steward of the custody."

In my opinion the steward has for the purpose of discharging the duties of his office a certain right to the court rolls—that is, to have possession of them for that purpose. He can be dispossessed of them if the lord shews that he is not acting properly; but the lord's right to the court rolls is controlled by this—that the steward has a right to them in the exercise of his duties. There is no suggestion in this case of any kind of misconduct on the part of the steward. I have no doubt that it is necessary for the purposes of the steward's office that the court rolls should remain where they are. The application fails, and I dismiss it with costs.

Solicitors: *Long & Gardiner, for Crust, Todd, Mills & Sons, Beverley; Ullithorne, Currey & Jennings.*

H. C. R.

BUCKLEY J.

1903

April 2.

In re ANGLO-ORIENTAL CARPET MANUFACTURING COMPANY.

[00335 of 1902.]

Company—Debentures—Registration—Extending Time—Winding-up before Date of Registration—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

A company in June, 1901, executed a trust deed and issued debentures creating a charge which required registration within twenty-one days under s. 14 of the Companies Act, 1900. The charge was not registered within the twenty-one days, but on November 1, 1901, an order was made under s. 15 of the Act extending the time for registration until November 15, but "without prejudice to the rights of parties acquired prior to the time when such trust deed and debentures shall be actually registered." The charge was registered on November 15, 1901; but in the meantime—on November 11—the company passed an extraordinary resolution for voluntary winding-up:—

Held, that the rights of the general body of creditors under the winding-up were protected by the saving words of the order, and that the debenture-holders were not as against them secured creditors.

In re I. C. Johnson & Co., [1902] 2 Ch. 101, explained.

THE Anglo-Oriental Carpet Manufacturing Company, Limited, by a deed dated June 25, 1901, demised certain leasehold hereditaments to trustees to secure the payment of the principal moneys and interest agreed to be paid by a series of debentures to secure 3000*l.* and interest, and charged, with payment to the trustees of the principal moneys and interest secured or to be secured by the debentures, to an amount not exceeding 3000*l.*, the business and undertaking and other assets of the company by way of a floating charge.

On the same day the company issued ninety-four debentures for 20*l.* each.

The securities above mentioned were not registered within twenty-one days, as required by s. 14 of the Companies Act, 1900.

On October 11, 1901, notice was issued of a meeting of the company to be held on October 21 to pass an extraordinary resolution for voluntary winding-up. The meeting was adjourned until November 11, 1901.

By an order of Joyce J., made on November 1, 1901, the time for registering the trust deed and the debentures was extended to November 15, 1901, "without prejudice to the rights of parties acquired prior to the time when such trust deed and debentures shall be actually registered."

On November 11, 1901, an extraordinary resolution for voluntary winding-up and the appointment of a liquidator was passed. On November 15 the registration of the charge was effected.

The liquidator issued an originating summons in the winding-up asking for the determination by the Court of the question whether, under the circumstances, the holders of the debentures were, as against the general creditors of the company, secured creditors. In his affidavit in support of the summons he said that he estimated the value of the company's assets at about 2000*l.*, and stated that about 2020*l.* was due for principal and interest on the debentures, and that about 2200*l.* was due to other creditors of the company.

MacSwinney, for the liquidator, stated the facts.

P. O. Lawrence, K.C., and *Austen-Cartmell*, for the trustees of the trust deed and the debenture-holders. Where the charge has not been registered within twenty-one days, as required by s. 14 of the Companies Act, 1900, the charge is, "so far as any security on the company's property or undertaking is thereby conferred . . . . void against the liquidator and any creditor of the company." But by s. 15, where there has been an omission to register within the time required, a judge may, "on such terms and conditions as seem to" him "just and expedient, order that the time for registration be extended."

An order extending the time till November 15 was made in the present case, and on registration the charge became a valid charge as from the date of its creation. But the order contained saving words, which are to the effect of those inserted in the order in *In re Joplin Brewery Co.* (1)

Who were parties having "rights acquired prior to the

(1) [1902] 1 Ch. 79.

BUCKLEY J. 1903 ANGLO-ORIENTAL CARPET MANUFACTURING COMPANY, *In re.*

time" of registration? In *In re I. C. Johnson & Co.* (1) Cozens-Hardy L.J. said: "The analogy of the Bills of Sale Act, which Buckley J. took in *In re Joplin Brewery Co.* (2), seems to me to be very close and precise; but, speaking for myself, I doubt whether the words which he has inserted—which are a mere transcript of the common form under the Bills of Sale Act—would have any effect in protecting creditors who had not taken some proceedings to get a charge or security upon the goods." It is noticeable that in one of the two cases under the Bills of Sale Act, 1878, which were cited in the argument, the person whose rights, it was held, could not be defeated by extending the time for registration was a creditor who had taken goods in execution; and in the other case the debtor's property had vested in his trustee in bankruptcy.

Cozens-Hardy L.J. meant that to be within the saving words of the order a creditor must have acquired before the time of actual registration some other right than the mere right to be paid.

[BUCKLEY J. The Master of the Rolls in *In re I. C. Johnson & Co.* (3) also refers to the question whether a creditor who has not issued execution ought to be protected, but says it is unnecessary to decide it.]

This case raises that question.

[BUCKLEY J. Is not the present case covered by my decision in *In re S. Abrahams & Sons*? (4)]

In that case the application to extend the time was not made until after the winding-up had commenced.

[BUCKLEY J. When the security was registered within the time allowed by the order there was by relation back a good charge from the date of its creation; but the words of the order preserve the rights of creditors under the intervening winding-up.]

The saving words only apply to creditors having rights in pari materiâ with a charge. The security would be valid for twenty days from the date of its creation, and might then be enforced, although there was no registration.

(1) [1902] 2 Ch. 101, 110.
(2) [1902] 1 Ch. 79.
(3) [1902] 2 Ch. 108, 109.
(4) [1902] 1 Ch. 695.

[BUCKLEY J. Is that so? The security is void unless registered, and the registration spoken of must be a registration made within twenty-one days. Is there any valid security before registration? The object of the section is that creditors of the company shall not have pocket securities.]

Norton, K.C., and *Muir Mackenzie*, for unsecured creditors. The securities are absolutely void as against the general creditors, for there was no registration when the winding-up commenced. The point is covered by *In re S. Abrahams & Sons.* (1) That case was cited in *In re I. C. Johnson & Co.* (2), and was not reflected on. The Court of Appeal did not suggest that rights crystallized by a winding-up would be affected.

[BUCKLEY J. Suppose a second charge were registered before the first charge was registered, but the first charge was registered within the twenty-one days, which charge would prevail?]

Probably the first charge would prevail; but, if an execution were put in before the registration (although within twenty-one days), the execution creditor would have priority.

Austen-Cartmell, in reply. In the case last put the debenture-holders would have priority over the execution creditor.

BUCKLEY J. In this case a trust deed was executed and debentures were issued in June, 1901. Sect. 14 of the Companies Act, 1900, was not complied with. That section provides that mortgages or charges, "created" by a company after the commencement of the Act, "shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company unless filed" within the time mentioned in the section. On November 1, 1901, an order was obtained extending the time for registration to November 15, and containing the words used in the order made in *In re Joplin Brewery Co.* (3) On November 11 the company went into voluntary liquidation by passing an extraordinary resolution for voluntary winding-up. At that time the trust

(1) [1902] 1 Ch. 695. (2) [1902] 2 Ch. 101.
(3) [1902] 1 Ch. 79.

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deed had not been registered. On November 15 the trust deed was registered.

The question I have to determine is whether, under these circumstances, the debenture-holders can set up their security so as to sweep away the assets from the unsecured creditors of the company. In my opinion they cannot. On November 11, 1901, by force of the Act of Parliament, the undertaking and assets of the company passed under the control of the liquidator, whose duty it was to convert them into money, and out of the proceeds to pay the creditors existing at that date. The assets have been said to be impressed in the hands of the liquidator with a statutory trust in favour of the creditors. Upon the commencement of the winding-up an immediate duty was cast upon the liquidator to collect the assets and distribute them among the creditors then existing. At that moment the debenture-holders were unsecured creditors of the company, for they did not hold any security registered as required by the Act of 1900. It has been argued on behalf of the debenture-holders that when registration was made on November 15, 1901, there arose a security which was not in existence at the date when the liquidation commenced. But, whether that was so or not, the order extending the time for registration was made "without prejudice to the rights of parties acquired prior to the time when such trust deed and debentures shall be actually registered." Whatever the exact limit of those words may be, they certainly in my judgment include the rights of creditors, acquired on the passing of the winding-up resolution, to have the assets realized and distributed among them pari passu.

I wish to add a few words on *In re Joplin Brewery Co.* (1) and *In re I. C. Johnson & Co.* (2) I thought it right in *In re Joplin Brewery Co.* (1) to follow the practice under the Bills of Sale Acts and insert the words, "but that this order be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." In so doing I had no intention of deciding anything as to the class of creditors whom that form of words would protect. In

(1) [1902] 1 Ch. 79. (2) [1902] 2 Ch. 101.

the Court of Appeal in *In re I. C. Johnson & Co.* (1) the question was discussed whether those words preserved only rights as against the company's property obtained by creditors who had taken some proceedings to get a charge or a security upon that property, or preserved also the rights of creditors who had not done so to have their debts paid out of the company's assets. Collins M.R. (2) said it was not necessary in that case to decide the point. The Court of Appeal, however, were there considering what words ought to be inserted in the order as a condition of giving relief to debenture-holders whose securities had not been registered within the time limited by the Act, and I should have thought that the Court having the point in view would have inserted words defining without ambiguity exactly what classes of creditors were to be protected by the order. But when the order of the Court of Appeal is looked at, it will be found that the words they used seem to have exactly the same effect as those which I used in *In re Joplin Brewery Co.* (3) In *In re Joplin Brewery Co.* (3) the creditors to be considered were only (*a*) those who were asking for the order, and (*b*) other creditors. In *In re I. C. Johnson & Co.* (1) the creditors to be considered were (*a*) those asking for the order, (*b*) others who contractually were entitled to rank pari passu with class (*a*), and (*c*) other creditors. The existence of class (*b*) raised a complication which did not exist in *In re Joplin Brewery Co.* (3) To give effect to the contractual rights of classes (*a*) and (*b*) inter se, careful and complicated provisions were necessary in *In re I. C. Johnson & Co.* (1) which were not required in *In re Joplin Brewery Co.* (3), and these were inserted in the order of the Court of Appeal. But as between classes (*a*) and (*b*) on the one hand, and class (*c*) on the other, the relevant words of the order of the Court of Appeal were simply "without prejudice to any rights . . . . which may have been or may be acquired against the holders of the said debentures . . . . prior to the time when the last-mentioned debentures shall be actually registered" —words differing in no respect in their effect from the words in

(1) [1902] 2 Ch. 101. (2) [1902] 2 Ch. 109.
(3) [1902] 1 Ch. 79.

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In re Joplin Brewery Co. (1), "without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." The only difference lies in the insertion of the words "against the holders of the said debentures," and these words, as it appears to me, make no difference, for the right which the statute creates in the creditor is a right as against the unregistered debenture-holder. I cannot, therefore, derive from *In re I. C. Johnson & Co.* (2) any assistance as to the classes of creditors who ought to be protected by the order in such a case as the present. However, assuming that the more restricted meaning is to be given to the words, and that those words cover only the rights of creditors by whom or on whose behalf some proceeding has been taken against the property of the company, I hold that the rights of the general body of the creditors at the commencement of the liquidation are within the terms of the order, because on the winding-up commencing every creditor had a right to say, "So much per cent. of the assets belongs to me in a due course of liquidation."

It appears to me that under the order of Joyce J. the debenture-holders are precluded from setting up their debentures as against any creditors of the company existing at the time of the passing of the resolution for winding-up.

I have dealt with the matter at some length. I think, however, that the case is covered by my previous decision, *In re S. Abrahams & Sons* (3), and by that which was said by way of suggestion by Stirling L.J. in *In re I. C. Johnson & Co.* (4) The costs of all parties will come out of the assets of the company.

Solicitors for liquidator and unsecured creditors: *Ridsdale & Son, for Chadwick & Sons, Dewsbury.*

Solicitors for trustees of the deed: *Pritchard, Englefield & Co.*

(1) [1902] 1 Ch. 79.
(2) [1902] 2 Ch. 101.
(3) [1902] 1 Ch. 695.
(4) [1902] 2 Ch. 110.

F. E.

HARINGTON *v.* SENDALL.

JOYCE J.
1903
March 3, 4.

[1903 H. 425.]

Club—Alteration of Rules—Raising Subscription—Expulsion of Member—Injunction.

A club which is governed by rules prescribing the amount of the annual subscription, but not containing any provision for the amendment or alteration thereof, cannot by a resolution passed by a majority of the members present at a general meeting raise the amount of the subscription so as to bind existing members, and the Court will interfere by injunction to restrain the expulsion of a dissentient member for refusing to pay the increased subscription.

THIS was a motion by the plaintiff, who was a member of the Oxford and Cambridge University Club, for an interlocutory injunction to restrain the defendants, the committee of management of the club, from interfering with the enjoyment by the plaintiff of the benefits and privileges of the club, and from posting up the plaintiff's name as that of a member in default with his subscription, and from erasing the plaintiff's name from the list of members.

The plaintiff was elected a member of the club in 1886, and upon his election he was supplied with a book entitled "Rules and Regulations of the Oxford and Cambridge Club, 1885."

These rules were prefaced by the following statement: "The Oxford and Cambridge University Club is instituted for the association of gentlemen educated at those universities, and for promoting and continuing a mutual interest and fellowship between them. As every member will, upon the payment of his entrance-fee and subscription, become entitled to the benefits and privileges of the club, so such payment will be considered as a declaration of his submission to the following rules and regulations:—"

The rules, so far as material, provided as follows:—

"XIV. An annual subscription of eight guineas shall be due and payable from each member on the first day of January."

"XVI. On the 1st of February in every year the names of the members who shall not have paid their annual subscription

JOYCE J. 1903 HARINGTON v. SENDALL.

shall be put up in the principal club-room, and a written notice of the same shall be sent them.

"XVII. In case the annual subscription of any member shall not have been paid on or before the first day in March, his name shall be erased from the list of members, unless he can excuse his default to the satisfaction of the committee" (subject to an exemption in favour of members residing abroad).

[Rules XXI. and XXII. determined the constitution and powers of the committee of management.]

"XXIII. An annual meeting of the club shall be held, for general purposes, on a day in the month of May to be fixed by the committee, of which one month's notice shall be given by cards affixed in all the principal rooms of the club. Notice of this meeting, and a copy of any motion of which notice has been given under Rule XXVI., shall be sent to each member fourteen days before the day of meeting."

"XXVI. If any measure not connected with the affairs of the club for the past year shall be intended to be proposed to the annual general meeting, twenty-one days' notice shall be given of the same, and a copy sent to each member as provided by Rule XXIII."

"XXXII. Every member on his admission shall pay an entrance-fee of forty guineas, besides the annual subscription for the current year."

"XLVIII. Any infraction of the rules or regulations of the club shall be taken immediate cognizance of by the committee, and if such infraction shall appear to have been direct and wilful, it shall be attended with the immediate expulsion of the offending member."

No provision for any alteration or amendment of the rules was contained either in this or in any subsequent edition of the rules and regulations.

At the annual general meeting of the club, duly convened and held on May 28, 1902, it was resolved by a large majority of the members present that the annual subscription should be increased to nine guineas, and that Rule XIV. should be altered accordingly. The plaintiff, who was unable to be present at the meeting, disputed the validity of this resolution,

and in January, 1903, he sent a cheque for eight guineas to the bankers of the club for his subscription for the current year; but by the direction of the defendants this cheque was returned to him as insufficient, and in February the defendants caused the plaintiff's name to be posted up in the club premises as that of a member in default with his subscription. The plaintiff thereupon commenced this action, and moved for an injunction. Several other dissentient members had also declined to pay the increased subscription.

The club was founded in the year 1830, and the subscription had been raised on three different occasions, namely, in 1832, from five guineas to six guineas; in 1867, from six guineas to seven guineas; and in 1881, from seven guineas to eight guineas; and the amount of the entrance fee had also been raised from time to time, and since the plaintiff had become a member of the club the rules had been several times altered, but in minor particulars only. Since the foundation of the club the rules had been altered on no less than thirty different occasions. These alterations were effected by resolutions passed by a majority of members present at the annual meetings of the club, and hitherto no objection had ever been raised, either by the plaintiff or by any other member, to the power of the general meeting to alter the rules. The defendants had come to the unanimous conclusion that it was necessary for the financial well-being of the club that the annual subscription should be raised to nine guineas, having regard to the unavoidable increase in the annual expenditure of the club, especially in the matter of rates and taxes.

Hughes, *K.C.*, and *J. A. Simon*, for the plaintiff. The question is whether, there being no express power given to the club to alter its rules, the club can by a resolution passed by a majority of the members present at the annual general meeting raise the subscription as regards old members. It is submitted that a club has no inherent power to alter its rules, at any rate as regards essential points. There is no authority directly in point, but we rely upon the dictum of Jessel M.R. in *Dawkins* v. *Antrobus* (1), where he says: "There is no more

(1) (1881) 17 Ch. D. 615, 620.

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inherent power in the members of a club to alter their rules so as to expel one of its members against the wishes of the minority, than there is in the members of any society or partnership which is founded on a contract, that written contract of course expressing the terms on which the members associate together." Assuming that the club has no inherent power to alter its rules, the Court has jurisdiction to interfere by injunction to restrain the club from expelling a member for not conforming to the altered rules. That jurisdiction is founded upon the interest which every member has in the club property, and of which he would be deprived by being improperly expelled: *In re St. James's Club* (1); *Rigby* v. *Connol.* (2)

Haldane, K.C., and *R. J. Parker*, for the defendants. By a course of practice extending over nearly three-quarters of a century the expression in Rule XXIII., "general purposes," has been interpreted as implying a power to alter the rules. Having regard to the uniform practice of the club, it must be taken that even if there were no inherent power to mould the rules under which the common concern is carried on, the members have given themselves this power, and it cannot be contended that the rules and regulations constitute a fundamental contract which any one member can prevent the majority from altering. In an ordinary partnership the course of dealing may be such as to shew that the written terms of the partnership have been changed by tacit consent: *Const* v. *Harris.* (3) The principle there laid down by Lord Eldon applies to this case. Social clubs such as the one here in question cannot be carried on at all unless there is power to alter the rules as the necessities of the club may demand. Anything which relates to the internal management of a club, provided that it is within the objects for which the club was started, must lie within the powers of the majority of the members at a general meeting. The rules contemplate that the policy of the club shall be determined by the general meeting. That policy must be carried out by the committee, and that involves the incurring of expense. The individual

(1) (1852) 2 D. M. & G. 383, 387.
(2) (1880) 14 Ch. D. 482.
(3) (1824) T. & R. 496, 523; 24 R. R. 108.

members are not liable for the debts of the club, but the liability is upon the committee, and the committee must look for their indemnity to the property of the club, i.e., to the entrance-fees and subscriptions. It would be within the power of the general meeting to determine, for example, the question whether the club-house should be enlarged or a new one acquired, and that is a matter which would certainly involve an increase of expenditure. It is unreasonable to hold that, although the majority of members can direct the committee to incur an increased expenditure, they have not also the power to raise the subscriptions to meet that increased expenditure. Again, it is submitted that the general meeting might fix a differential rate of subscription as between old and new members, or as between town and country members; but that is a larger alteration than raising the subscription as regards all the members. Apparently it is not contended that the club cannot raise the subscription as regards new members; yet that equally involves a power to alter the rules. The only limit is that the alteration must be bonâ fide "for promoting and continuing a mutual interest and good fellowship" between the members.

Further, the plaintiff, never having objected to any previous exercise of the power of the general meeting to alter the rules, is precluded by acquiescence from raising any objection in the present instance.

Hughes, K.C., in reply. In *Const* v. *Harris* (1) the assent of all the partners was necessary. There is no evidence of acquiescence.

Cur. adv. vult.

March 4. JOYCE J. The question in this case is whether the majority of the members of the Oxford and Cambridge University Club assembled in general meeting have power to alter the rule prescribing the annual subscription and to raise the amount, so as in effect to deprive a dissentient minority of their privileges and exclude them from the club unless they submit to pay such increased subscription in every future year.

(1) T. & R. 496; 24 R. R. 108.

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When the plaintiff became a member he thereby, as provided by the introductory clause to the rules, on payment of his entrance fee and subscription, became entitled to the benefits and privileges of the club, and was to be taken to have declared his submission to the then rules and regulations. I say "the then rules and regulations" because the words are not "such rules and regulations as may be made from time to time," but "the following rules and regulations." In other words, he agreed to be bound by the written contract that is to be found in the rules. Unfortunately, as I think, those rules did not, nor, indeed, do the present rules, contain any provision for the making of amendments or alterations from time to time.

But it is contended that there must be an inherent power in general meetings, by a numerical majority of the members for the time being present to alter the rules either in any manner they may think fit, or, at all events, within certain limits that have not been precisely defined. For this proposition, however, nothing that can really be called an authority has been cited. Indeed, so far as there can be said to be authority upon the subject, and, as I think, upon principle, there is no more inherent authority in the members of the club by a majority in general meeting to alter the rules against the wishes of a minority than there is in the members of any other society or association the constitution of which depends upon and is matter of contract—there being as there is here a written contract expressing the terms upon which the members associate together. In my opinion, there is no power in the majority of the members to alter those terms and the constitution of the club as they may think fit, when such a power forms no part of the written contract by which the members are bound.

Rule XXIII. has been referred to, which provides that an annual meeting of the club shall be held for general purposes in the month of May in each year. It is not alleged, however, that the primary or ordinary meaning of the term "general purposes" is or includes the alteration of the rules or constitution of the society. But it is said that in fact such an interpretation has been put upon these words by the practice of the club at annual meetings. No doubt, in the case of a very

ancient statute, where the words are ambiguous, you may refer to the contemporanea expositio of usage as the interpreter of a doubtful law. Here, nothing is so doubtful as to require a reference to usage for its interpretation, even if usage were admissible for the purpose of construction where everything is quite modern.

Reference was also made to the analogy of what sometimes happens in a partnership when all the members agree or acquiesce in a new arrangement; but, in my opinion, the cases referred to were essentially different. A club is not a partnership, or even a quasi-partnership, for many reasons, nor, indeed, in a partnership can a majority override the will of the minority in such a matter as this, unless it be so provided in the articles. If the majority here can raise the subscription to nine guineas, I do not see why they have not the power if so minded to raise it to twenty guineas, or to make calls upon the members to discharge any debt that may have been contracted by the committee.

Again, it is said that the plaintiff has acquiesced in certain alterations in the rules having during his time been made by general meetings. Such alterations appear to me to have been altogether of a minor character, and it may have been with perfect unanimity of opinion among the members. Because the plaintiff instituted no action for an injunction in these trifling matters, when neither he nor any one else objected, I cannot hold him to be precluded from insisting upon his right when a case arises in which his pecuniary interests are directly and materially affected.

Upon the whole case, then, I have not to consider the reasonableness or otherwise of what was proposed by the committee or approved by the general meeting, nor have I to consider the propriety or otherwise of the course taken by the dissentient minority under the circumstances of this case; but, if the plaintiff insists upon it, I am compelled to come to the conclusion that he is entitled to the injunction which he seeks.

Solicitors: *Lawford, Waterhouse & Lawford; Walker, Martineau & Co.*

H. B. H.

JOYCE J
1903
Feb. 5;
March 14.

In re WALPOLE'S MARRIAGE SETTLEMENT. THOMSON *v.* WALPOLE.

[1902 W. 3763.]

Marriage Settlement—Special Power of Appointment—Appointment of Trust Funds for the time being subject to the Trusts of the Settlement—Assignment by Appointee of his Share in the Trust Funds and all other (if any) his Estate and Interest of and in all other the Trust Funds for the time being subject to the Trusts of the Settlement—Subsequent Acquisition of Interest by Trustees of Settlement.

By marriage articles dated in 1845 certain funds were settled upon trust for the husband, Sir R. W., for life, then for the wife, Lady W., for life, then for the children of the marriage as the husband should appoint, or in default of appointment by the husband as the wife should appoint. In 1876 Sir R. W. died without having exercised his power of appointment except as to a specific portion of the funds appointed in trust for a daughter. In 1879 Lady W. appointed that after her decease the trustees should stand possessed of the trust funds for the time being subject to the trusts of the articles (other than the sum appointed by Sir R. W.) in trust for the remaining six children of the marriage in equal shares. In 1893 one of the sons, William, by his marriage settlement assigned to trustees his one-sixth share of the trust funds (which he specified in a schedule) to which he was entitled on the death of his mother, and all other (if any) his estate and interest of and in all other the trust funds for the time being, subject to the trusts of the articles of 1845. By a codicil dated in 1878 Mrs. B. directed that the property which she had left by her will to Sir R. W. should be transferred to the trustees of the marriage articles and be held upon the trusts thereof, and she died in 1900. Subsequently, in 1900, Lady W. appointed this property in trust for certain of her children (including William):—

Held, first, that the appointment of 1879 did not operate as an appointment of any moneys not then subject to the trusts of the marriage articles; secondly, that William's marriage settlement passed only such estate as he then had in the trust funds; and, therefore, that his share of the property bequeathed by Mrs. B.'s codicil was not included in that settlement.

Semble. The effect of Mrs. B.'s bequest was not to make the property an accretion to the funds originally settled by the marriage articles, but to create a new referential settlement of such property upon similar trusts.

By articles of settlement dated January 27, 1845, made on the marriage of Sir Robert and Lady Walpole, certain funds were agreed to be settled upon trust for Sir Robert Walpole for life, then upon trust for Lady Walpole for life, then upon trust

for the children of the marriage as Sir Robert Walpole should appoint, and in default of such appointment as Lady Walpole should appoint, and in default of any appointment upon trust for the children equally.

Sir Robert Walpole died on July 12, 1876, without having exercised his power of appointment except by appointing certain specific sums of Consols to a daughter, Geraldine.

By a deed-poll dated November 18, 1879, Lady Walpole appointed that the trustees for the time being of the marriage articles should after her decease and subject to her life interest stand possessed of the capital and income of the trust moneys, shares, stocks, funds, and securities settled by these articles or for the time being subject to the trusts thereof (other than the aforesaid specific sums of Consols appointed to Geraldine) and the dividends thereof in trust for the other children of the marriage, namely, Spencer C. Walpole, Mary Walpole, Emma Walpole, William Henry Walpole, Catherine L. Walpole, and Margaret G. Walpole, in equal shares.

William Henry Walpole by a settlement upon his marriage dated September 29, 1893, after reciting among other things that under the articles of settlement of 1845 and the appointment of 1879 he was entitled in reversion to a one-sixth share of certain investments specified in the 1st schedule thereto (being the trust funds then subject to the trusts of the articles other than the aforesaid sums of Consols appointed to Geraldine) assigned to trustees upon the usual trusts—"Firstly, all that the one-sixth part or share to which the said William Henry Walpole is entitled in reversion expectant upon the decease of the said Dame Gertrude Rundle Walpole as aforesaid of and in the funds, stocks, shares, and securities specified in the first schedule hereunder written, being part of the trust funds subject to the trusts of the said articles of settlement of the 27th day of January, 1845, and all other (if any) his estate and interest of and in all other the trust moneys, funds, stocks, shares, and securities for the time being subject to the trusts of the said articles of settlement of the 27th day of January, 1845"; and, secondly, certain other property not necessary to refer to.

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1903
WALPOLE'S MARRIAGE SETTLEMENT, *In re.*
THOMSON *v.* WALPOLE.

Mrs. Sophia Frances Berens, who was a sister of Sir Robert Walpole, by her will dated January 22, 1875, directed certain funds to be divided between her brothers and sisters, and gave a leasehold house in Chesham Street and its contents and her carriages and horses to Sir Robert Walpole, and by a codicil dated December 23, 1878, she directed that the amount of property left by her will to Sir Robert Walpole should be paid to the trustees of Lady Walpole's marriage settlement (meaning thereby the articles of 1845) and held on the trusts thereof.

Mrs. Berens died on February 8, 1900.

By a deed dated July 23, 1900, to which Lady Walpole was the party of the first part, after reciting that doubts had arisen as to whether the property given by Mrs. Berens' codicil to the trustees of the marriage articles was comprised in the appointment of 1879, in order to put an end to such doubts it was declared that such property was to be deemed not to be comprised in such appointment, and Lady Walpole thereby appointed the same property from and after her decease and subject to her own life interest in trust for Spencer C. Walpole, Mary Walpole, William Henry Walpole, Catherine L. Walpole, and Margaret G. Walpole in equal shares.

In November, 1900, W. H. Walpole charged his share and interest under the deed of July 23, 1900, in favour of his sister Mary with the payment of 600*l.* and interest, and he subsequently gave a further charge over the same property for 100*l*, and he died on January 31, 1902.

In these circumstances an originating summons was taken out by one of the trustees of W. H. Walpole's marriage settlement against the executor of his will (who was also the other trustee of the settlement) and Mary Walpole to determine whether the trustees of the settlement were entitled (subject to the life interest of Lady Walpole) to the share of the said W. H. Walpole in the property left by the codicil of Mrs. Berens, or whether it formed part of his estate.

Howard, for the plaintiff. W. H. Walpole's share of any property which comes into the hands of the trustees of the marriage articles of 1845 is caught by the words in his

marriage settlement, "and all other (if any) his estate and interest of and in all other the trust moneys, funds, stocks, shares, and securities for the time being subject to the trusts of the said articles."

Ashton Cross, for the defendants. To construe the general words in W. H. Walpole's marriage settlement as bringing in after-acquired property is straining the natural meaning of the words. They were inserted to provide against anything being omitted, and they are limited to property then in existence.

Howard, in reply.

Cur. adv. vult.

March 14. JOYCE J. (after stating the facts and reading the summons). Probably it is not necessary to decide whether the effect of Mrs. Berens' codicil was to make the property thereby bequeathed to the trustees of the marriage articles of 1845 a fund to be added and treated in all respects as an accretion to the funds originally settled, as in *Eustace* v. *Robinson* (1), or to create another settlement with referential trusts, as in *Re North* (2), where Stirling J. held that by a bequest of property to the trustees of a settlement upon the same trusts there was not an accretion to the trust funds of the settlement, but a settlement with referential trusts of an independent fund. It appears to me, however, that even if Lady Walpole, with respect to the property which the trustees of the marriage articles took by the codicil of Mrs. Berens in 1900, could by the deed of 1879 have exercised the limited and fiduciary power of appointment which she had under the marriage articles of 1845 before such power was created in reference to that property (see Farwell on Powers, 2nd ed. p. 226, and *In re Hayes* (3)), the appointment by her in 1879, according to the true construction thereof, did not purport and was not intended to operate and did not operate as an appointment of any moneys, shares, stocks, funds, or securities not then already subject to the trusts of the marriage articles. Mrs. Berens did not direct the property by her codicil bequeathed to the trustees

(1) (1880) 7 L. R. Ir. 83. (2) (1897) 76 L. T. 186.
(3) [1901] 2 Ch. 529.

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of the marriage articles to be held upon the trusts thereof and of any appointment then already made in exercise of the power of appointment therein contained; such codicil does not in any way refer to the appointment of 1879 or to the marriage settlement of W. H. Walpole. Now, what W. H. Walpole assigned to the trustees of his marriage settlement of 1893 was his one-sixth share under the appointment of 1879 in the stocks specified in the 1st schedule to such marriage settlement and all other (if any) his estate and interest of and in all other the trust moneys, funds, stocks, and securities for the time being subject to the trusts of the marriage articles of 1845. But, if I am right, he did not by the appointment of 1879 acquire any share or interest in the property subsequently bequeathed by Mrs. Berens. Further, in my opinion, the assignment in his marriage settlement passed only such estate and interest as he then had. It neither was nor purported to be a contract to assign any interest he might afterwards acquire by appointment (*Sweetapple* v. *Horlock* (1); *Lovett* v. *Lovett* (2); see also *Attorney-General* v. *Earl Selborne* (3), per Stirling L.J.), or indeed either by appointment or otherwise in any property not then subject to the trusts of the marriage articles, as, for instance, that afterwards bequeathed by Mrs. Berens to the trustees of such articles upon the trusts thereof. This bequest probably did not operate to make the property bequeathed an accretion to the funds originally settled by the marriage articles, but merely created a new referential settlement of such property upon similar trusts. At all events, I hold that the assignment by W. H. Walpole in his marriage settlement of all other (if any) his estate and interest of and in all other the trust moneys, funds, stocks, shares, and securities for the time being subject to the trusts of the marriage articles of 1845 did not comprise or affect any share or interest which subsequently came to him by the appointment of 1900 in the leasehold premises or other property bequeathed by the codicil to the will of Mrs. Berens.

Solicitors: *Payne, Shaw-Mackenzie & Lake.*

(1) (1879) 11 Ch. D. 745. (2) [1898] 1 Ch. 82.
(3) [1902] 1 K. B. 388, 398.

H. B. H.

In re FITZGERALD. SURMAN *v.* FITZGERALD.

[1901 F. 1499.]

JOYCE J.
1902
Oct. 27, 28.
1903
March 3, 4, 21.

Conflict of Laws—Jurisdiction—Husband and Wife—English Husband and Scotch Wife—Settlement of Wife's Property—Real Estate in Scotland—Contract in Scotch Form—English Trustees—Husband's Life Interest—Alimentary Provision—Not assignable or liable to Arrestment by Creditors—Repugnance to English Law—Mortgage by Husband to English Creditors—Invalidity.

On the marriage in Scotland of a domiciled Englishman with a domiciled Scotswoman the wife's property, consisting partly of Scotch heritable bonds (which, according to the law of Scotland, are treated as real or immovable property), was settled by a contract executed in Scotland in Scotch form. By this contract the trustees, who were the same persons as the trustees of a contemporaneous settlement of the husband's property, in English form, were to hold the property settled by the Scotch contract upon trust, in case the husband should survive the wife, to pay the income to him for life, all such payments to be "strictly alimentary, and not assignable or liable to arrestment" at the instance of his creditors. The husband survived the wife, having mortgaged his life interest to English creditors. By the law of Scotland if in such a case the husband fails to maintain the children of the marriage they are entitled to attach the alimentary provision made for him.

Upon a summons to determine the rights of the mortgagees as against the husband and an only child of the marriage:—

Held, that even if the construction and effect of the contract were properly determinable by the law of Scotland, its validity and operation with respect to the question at issue must be determined by the law of England; and that inasmuch as the prohibition against alienation of the alimentary provision was according to English law repugnant and contrary to public policy, the husband's mortgagees were entitled to receive payment of the income from the trustees.

ADJOURNED SUMMONS.

By an indenture of settlement dated September 20, 1862, and made between William Robert Seymour Vesey Fitzgerald of the first part, the defendant Sir William Gerald Seymour Vesey Fitzgerald (hereinafter called Sir Gerald Fitzgerald) of the second part, Jane Margaret Matilda Macdonald Lockhart of the third part, and trustees of the fourth part (being a settlement made upon the marriage of Sir Gerald Fitzgerald and Miss Lockhart), W. R. S. V. Fitzgerald covenanted that

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his heirs, executors, and administrators would, within six months of his death, pay to the trustees the sum of 6000*l.*, to be held by them upon trust for investment as therein mentioned, and to pay the income of the trust fund to Sir Gerald Fitzgerald and his assigns during his life, and after his death to Lady Fitzgerald and her assigns during her life, and after the death of the survivor to stand possessed of the trust fund in trust for the issue of the intended marriage as therein declared. This settlement was in English form but was executed in Scotland, where the marriage took place. On the same date a marriage contract in Scotch form was executed by Sir Gerald and his then intended wife whereby, after reciting the English settlement, she assigned and conveyed to the same trustees all and sundry the lands and heritages, goods, gear, debts, and sums of money, and generally her whole property (with certain small exceptions) to the uses and purposes thereinafter mentioned, namely, first, for payment of the expenses of executing the trust; secondly, for payment of the free annual proceeds of the trust estate to the said J. M. M. Lockhart during all the days of her life, and that on her own receipt alone, exclusive of the jus mariti and right of administration of the said Sir Gerald Fitzgerald; thirdly, in case the said Sir Gerald Fitzgerald should be the survivor of the spouses, for payment of the whole free annual proceeds of the estate to him during all the days of his life after the death of the said J. M. M. Lockhart, declaring that all payments to the said Sir Gerald Fitzgerald should be "strictly alimentary," and should "not be assignable, nor liable to arrestment, or any other legal diligence at the instance of the creditors."

Shortly after the execution of these instruments the marriage took place. There was only one child of the marriage, the defendant Geraldine Tryphœna Margaret Seymour Vesey Fitzgerald, who was born on June 19, 1863.

Between the years 1863 and 1901 numerous deeds were executed in England by Sir Gerald and Lady Fitzgerald, in some of which Miss Fitzgerald joined, creating incumbrances upon their respective interests under the English and Scotch settlements. Subsequently to 1901 Sir Gerald further incum-

bered his life interest under the settlements. The defendant Colonel Frederick Henry Harford was the first mortgagee of Sir Gerald's life interest under the Scotch settlement.

Lady Fitzgerald died on May 16, 1901.

This was a summons taken out on October 12, 1901, by the trustees, who were all domiciled in England, asking (inter alia) that it might be determined whether Sir Gerald Fitzgerald was entitled for his life to the income of the trust funds comprised in the Scotch contract of marriage free from incumbrance and without power of alienation, or who was now entitled to the said income.

The trust funds originally comprised in the Scotch contract consisted partly of two bonds of the respective values of 6000*l.* and 7200*l.* secured upon heritable or immovable property in Scotland. The whole of the 6000*l.* and a portion of the 7200*l.* still remained so invested. By the law of Scotland heritable bonds of this character are real property, except for certain purposes specified in the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 117.

It appeared from an affidavit made by the Lord Advocate of Scotland that by the law of Scotland a person might create a life interest in favour of another, and by declaring it to be "alimentary" might exclude (so far as the life interest did not exceed in amount a reasonable provision) the diligence of ordinary creditors, and restrain all power of anticipation.

It further appeared that by the law of Scotland, if, in the case of such an alimentary provision as was in question in the present case, the husband failed to maintain the children of the marriage, they would be entitled to attach the alimentary provision made for him by the contract.

The principal question arising on the summons was whether the Scotch contract must be construed according to the law of Scotland or that of England.

E. Ford, for the trustees.

Badcock, K.C., and *T. T. Methold*, for Colonel Harford. The question is whether under the circumstances of this case the restraint on anticipation is valid. The husband is an English-

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man with an English domicil. He married a Scotswoman whose property was settled by a settlement in Scotch form whereby the life interest to the husband was given for aliment. The marriage took place in Scotland; but the matrimonial domicil was intended to be, and was in fact always in England. If the Scotch law applies, the whole of the money will be required for aliment. There is no suggestion that the estate should be administered by the Scotch Courts. The trustees are English, and the investments are not limited to Scotch property. Under these circumstances we say, first, that English law is the proper law of this contract, i.e., the law by which the parties intended, or may be fairly presumed to have intended, the contract to be governed: Dicey's Conflict of Laws, r. 143, p. 540. As explained by Dicey, the lex loci contractus is an ambiguous expression, and may mean either the law of the country where the contract was made or the law by which the parties intended the contract to be governed: Dicey's Conflict of Laws, p. 74. That learned author states two rules which are applicable to this case—first, that "a marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicil": rule 172, sub-r. 1, p. 653; secondly, that "the interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined in accordance with the proper law of the contract": rule 149, p. 563. Taking these two rules together, we say that the English law is to be applied here: *Colliss* v. *Hector* (1); *Viditz* v. *O'Hagan* (2); *Cooper* v. *Cooper* (3); *Chatenay* v. *Brazilian Submarine Telegraph Co.* (4); *Duncan* v. *Cannan* (5); *Don* v. *Lippmann* (6); *In re Bankes.* (7)

Secondly, we say that this contract is contrary to the policy of the English law, which requires that if a man has a life interest it shall be liable to be seized by his creditors: *Brandon* v. *Robinson* (8); *Graves* v. *Dolphin* (9); and therefore will not

(1) (1875) L. R. 19 Eq. 334.
(2) [1900] 2 Ch. 87.
(3) (1888) 13 App. Cas. 88.
(4) [1891] 1 Q. B. 79, 82–3.
(5) (1854) 18 Beav. 128.
(6) (1837) 5 Cl. & F. 1, 13, 14; 47 R. R. 1.
(7) [1902] 2 Ch. 333, 343.
(8) (1811) 18 Ves. 429, 433; 11 R. R. 226.
(9) (1826) 1 Sim. 66; 27 R. R. 166.

be enforced in this country: Dicey's Conflict of Laws, pp. 558, 560; *Rousillon* v. *Rousillon* (1); *Grell* v. *Levy* (2); *Hope* v. *Hope.* (3) Thirdly, we say that when this property is being administered for the benefit of the creditors, the law which applies is the lex fori: *Thurburn* v. *Steward.* (4)

Blakesley, for another incumbrancer, cited *Este* v. *Smyth.* (5)

W. F. Hamilton, K.C., and *W. E. Vernon; Christopher James; Ashworth James; A. H. Withers; G. D. Pepys;* and *G. R. Northcote*, for other incumbrancers.

Hughes, K.C., and *W. F. Phillpotts*, for Sir Gerald Fitzgerald. 1. Apart from the question whether this property is movable or immovable, this is a Scotch contract and the Scotch law is the proper law of the contract—that is to say, the parties intended it to be governed by Scotch law.

2. So far as the settled property was immovable, there can be no doubt that the law of Scotland is applicable: Westlake on Private International Law, 3rd ed. pp. 189–192, ss. 156, 157, 159, 160, 165, 167.

The husband's property was settled by an English settlement and the wife's property by a Scotch settlement. It is only by applying the Scotch law that any validity can be given to the Scotch settlement; therefore the necessary inference is that the contract was intended to be governed by Scotch law. The husband does not take a life interest, but he takes merely an alimentary provision out of the wife's property, and every alimentary creditor can enforce by process of execution his right against this alimentary provision: *In re Barnard* (6); *Chamberlain* v. *Napier.* (7); *Corbet* v. *Waddell.* (8) Under this contract the husband took only a modified interest in an alimentary provision for himself and children during his life, and that implies that he shall not part with it. This provision is not immoral, and is not contrary to the policy of the law: *In re Missouri Steamship Co.* (9)

There is nothing contrary to the policy of the English law

(1) (1880) 14 Ch. D. 351.
(2) (1864) 16 C. B. (N.S.) 73.
(3) (1857) 8 D. M. & G. 731.
(4) (1871) L. R. 3 P. C. 478.
(5) (1854) 18 Beav. 112.
(6) (1887) 56 L. T. 9.
(7) (1880) 15 Ch. D. 614.
(8) (1879) 7 R. 200.
(9) (1889) 42 Ch. D. 321, 336.

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in a person settling property on another so that he shall not alienate. And there is nothing in the comity of nations to prevent the English Court from giving effect to this contract, although it may contain provisions which according to English law are invalid.

[As to the nature of Scotch heritable bonds, they referred to *Jerningham* v. *Herbert*. (1) They also cited *Chatfield* v. *Berchtoldt*. (2)]

Younger, K.C., and *Crossman*, for Miss Fitzgerald. There is nothing in the contract which is obnoxious to English law. Sir Gerald Fitzgerald in attempting to assign his interest has dealt with property over which there is an overriding charge in favour of the children of the marriage. This is a foreign instrument containing provisions not judicially known to this Court, and it must be construed according to the law of the country where it is known. There is no rule of positive law which conflicts with the provisions of the contract.

Badcock, K.C., in reply. This is an attempt by means of a Scotch settlement to create an interest which is repugnant to English law. The proper forum is the English Court. The question affects the rights of English creditors, and the English Court will not, as against them, assist the protected life interest created by the Scotch contract.

The question arises as to the income in the hands of the trustees. It is immaterial from what that income is derived. Moreover, the trustees have power at any time to convert the whole of the trust property into cash and invest it in Consols. That might have been done directly after the marriage. It is not material, therefore, that under certain circumstances the income might be derived from heritable bonds, which for some purposes are, according to the law of Scotland, treated as realty: *Scott* v. *Allnutt* (3); *In re Piercy*. (4) It is contrary to the policy of the English law that a man should have a life interest protected from his creditors: *Brandon* v. *Robinson* (5); *Graves* v. *Dolphin*. (6) The law of the matrimonial domicil

(1) (1829) 4 Russ. 388; 28 R. R. 136.
(2) (1872) L. R. 7 Ch. 192.
(3) (1831) 2 Dow. & Cl. 404.
(4) [1895] 1 Ch. 83.
(5) 18 Ves. 429; 11 R. R. 226.
(6) 1 Sim. 66; 27 R. R. 166.

is the proper law to regulate the contract: Dicey on the Conflict of Laws, 571; Westlake on International Law, 3rd ed. pp. 69, 258; *Grell* v. *Levy* (1); *Hope* v. *Hope* (2); *Rousillon* v. *Rousillon* (3); *Sottomayor* v. *De Barros* (4); *Don* v. *Lippmann*. (5) The authorities cited on the other side are distinguishable, because in none of them was an English Court asked to give effect to anything which was contrary to the policy of English law.

With regard to those of the incumbrances in which Miss Fitzgerald joined she cannot dispute their operation: *Lee* v. *Lee*. (6) There is no question as to the jurisdiction of the English Court: *Lord Cranstown* v. *Johnston*. (7) [He also referred to *Ex parte Pollard*. (8)]

March 21. JOYCE J. (after stating the facts as to the marriage, and referring to the terms of the Scotch contract). Under the provisions of this document, which I may call the Scotch settlement, the trustees have from time to time become entitled to receive and had vested in them various funds comprising (inter alia) Scotch mortgages or heritable bonds and sums of Consols and India stock, but not any Scotch real or immovable estate other than mortgages or heritable securities, if they be, as alleged, real estate and to be treated as immovable property.

Lady Fitzgerald, the wife, died in 1901. Sir Gerald having previously, as he has also since that date, and in some cases with the concurrence of his wife, executed in England various assignments of or charges upon his interest under the Scotch settlement, the question has arisen whether the income or alimentary provision to which Sir Gerald Fitzgerald has become entitled under the Scotch settlement is now payable by the trustees to Sir Gerald or to his assigns and incumbrancers. It is contended on behalf of Sir Gerald and the only child of the marriage that, according to the law of Scotland, which it is said governs the case, the effect of the declaration in the

(1) 16 C. B. (N.S.) 73.
(2) 8 D. M. & G. 731.
(3) 14 Ch. D. 351.
(4) (1877) 3 P. D. 1.
(5) 5 Cl. & F. 1, 13, 14; 47 R. R. 1.
(6) (1876) 4 Ch. D. 175.
(7) (1796) 3 Ves. 170; 3 R. R. 80.
(8) (1840) Mont. & Ch. 239.

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Scotch settlement that all payments to Sir Gerald shall be alimentary and not assignable or liable to arrestment, precluded Sir Gerald from assigning or creating any valid incumbrance upon the income to which he would otherwise be now entitled under the trusts of the Scotch settlement.

The domicil of Sir Gerald has remained English all along. His residence is in England. The trustees are all subject to the jurisdiction of the English Court. Indeed, it is they who have invoked its aid in order to determine the question that has been raised. In the existing circumstances, even if the construction and legal effect of this Scotch settlement are to be determined by the law of Scotland—*In re Barnard* (1)—it appears to me that its validity and operation with respect to the matter now in question must be determined by the laws of England: Westlake on International Law, p. 76; Vaizey on Settlements, p. 1640, et seq.

Further, if the question were to be considered as one purely of contract between the parties to the Scotch settlement, a contract inconsistent with the law and policy of this country, or, in other words, which conflicts with what are deemed in England to be essential public interests, could not be enforced here: Westlake on International Law, 3rd ed. s. 215.

But according to the law of England an inalienable trust cannot be created in favour of a man even for his maintenance. A mere prohibition of alienation cannot be effectually imposed except in the case of a married woman's separate property: *Brandon* v. *Robinson* (2); *Graves* v. *Dolphin* (3); *Younghusband* v. *Gisborne*. (4) It is contrary to the policy of the law in this country that property should be so settled as to continue in the enjoyment of a bankrupt notwithstanding bankruptcy. In other words, the declaration in the Scotch settlement that all payments to Sir Gerald shall not be assignable or liable to arrestment at the instance of creditors is void and inoperative according to English law, being repugnant and contrary to public policy.

It can hardly be doubted that, so far as relates to the pure

(1) 56 L. T. 9.
(2) 18 Ves. 429; 11 R. R. 226.
(3) 1 Sim. 66; 27 R. R. 166.
(4) (1844) 1 Coll. 400.

personalty or movable property comprised in the Scotch settlement, the law of England must govern the case. And upon consideration, having regard to the frame of the settlement, I think there is no difference with respect to such part, if any, of the funds or securities comprised in the settlement as ought, according to the law of Scotland, to be treated and considered as real or immovable property. What Sir Gerald has is a personal claim against the trustees for payment of the residue of the income derived from the several investments for the time being subject to the Scotch settlement, after payment thereout of all the expenses of executing the trusts. I think that the decision of the House of Lords in *Scott* v. *Allnutt* (1), cited in Story on the Conflict of Laws, applies. See also per Lord Nottingham in *Noell* v. *Robinson*. (2) It is unnecessary, therefore, to consider whether, even if this were not so, the income as soon as it came to the hands of Sir Gerald would not be bound in equity by the assignments he has made, so as to render him liable to be restrained by injunction from disposing of such income otherwise than by payment to his assignees. It is also, I think, unnecessary to consider whether, if it could be shewn that as to any part of the property comprised in the Scotch settlement (e.g., the portion consisting, or that did consist, of heritable bonds or Scotch mortgages) the law applicable was primâ facie that of Scotland, such law ought not to be enforced in the Courts of this country, upon the ground that it would result in injustice to English creditors or incumbrancers.

Upon the whole, I am of opinion that in the circumstances of the present case Sir Gerald Fitzgerald is not entitled to require payment to himself of the income of the trust funds as being free from incumbrances or without power of anticipation, but that his assignees or incumbrancers are the persons entitled to receive payment from the trustees of the Scotch settlement.

Solicitors: *Redfern & Hunt; Stibbard, Gibson & Co.; Currey & Hawkins; White, Borrett & Co.; G. J. Fowler; Trower, Still & Co.; Keen, Rogers & Co.; Surman & Quekett.*

(1) 2 Dow. & Cl. 404. (2) (1681) 2 Vent. 358.

G. A. S.

SWINFEN EADY J.
1903
April 21.

In re PHILLIMORE. PHILLIMORE *v.* HERBERT.

[1903 P. 131.]

Tenant for Life and Remainderman—Apportionment—Authorized Security—Loss—Period of Account.

Where an authorized security becomes insufficient and there is a partial loss of capital and income, the account necessary to apportion the amount realized between life tenant and remainderman must be taken from the date when it was first ascertained that the security was insufficient up to the date of realization, the life tenant bringing all income received during that period into hotchpot.

ORIGINATING SUMMONS.

By his will dated May 29, 1886, a testator devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion, with full power of postponement, and directed them to hold the proceeds in trust for his wife, the late life tenant, for her life, and after her death, in the events which happened, upon such trusts as the proceeds would be held upon if directed to be laid out in real estate to be settled upon the present life tenant for his life, with remainder to his eldest son in tail male, with divers remainders over.

The testator directed the trustees to apply the actual income of any property of whatever nature for the time being forming part of his residuary estate as if it were income arising from the net proceeds of his residuary estate. He also authorized them to invest the trust moneys (inter alia) on mortgage of leasehold estates in England.

The testator died on February 5, 1887. His residuary estate included a mortgage debt of 25,000*l.* secured on a leasehold house in Kensington, and bearing interest at 5 per cent., reducible to 4½ per cent. on punctual payment. The lease was for a term of eighty years, expiring on September 29, 1954, at a ground rent of 375*l.* By the terms of the mortgage the principal could not be called in till February 20, 1893, so long

as the interest was punctually paid. At this date, although the interest was regularly paid, the trustees were unable to obtain payment of the principal or to realize the security.

In 1896, 2000*l.* was paid off.

On April 6, 1898, pursuant to an arrangement sanctioned by the Court, the mortgagor paid another 3000*l.* of the principal, 966*l.* then due for interest from April 18, 1897, and 100*l.* for costs, and assigned the equity of redemption to the trustees in full satisfaction of his liability for the sum of 20,000*l.* remaining due on the mortgage. The property was at the time unlet.

On November 9, 1898, North J. made an order declaring that the whole of the 966*l.* ought to be paid as income to the late life tenant, and that the ground rent ought to be paid and the lessee's covenants performed out of the capital of the residuary estate, but without prejudice to any question as to the application of any surplus rents of the leasehold house to be produced thereafter after providing for the ground rent and outgoings.

From the time of the assignment of April 6, 1898, the total rent received by the trustees was insufficient to discharge the ground rent and outgoings, so that no net income was produced in respect of this property.

The late life tenant died on January 21, 1900.

On September 29, 1902, the trustees, with the leave of the Court, sold the property for 8000*l.*

This summons was issued to determine (inter alia) how the 8000*l.* ought to be apportioned between the late life tenant's executors, the present life tenant, and the remainderman.

Gent, for the present life tenant. The case in substance is simple. Full interest was paid on the leasehold mortgage from the testator's death on February 5, 1887, up to February 6, 1898, after which no income was produced. The late life tenant died on January 21, 1900, and the property representing the investment, which must be treated throughout as a security for 20,000*l.*, realized 8000*l.* on September 29, 1902. For the purpose of apportionment the account should strictly be taken from the testator's death up to the date of realization, the life

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estates bringing all income received into hotchpot: *Cox* v. *Cox* (1); *In re Foster* (2); *In re Bird.* (3)

As, however, this account would clearly shew that the late life tenant was overpaid, so that her executors have no claim, it is only necessary to take the account from her death as between the present life tenant and the remainderman.

Theobald, K.C., amicus curiæ, referred to *Stewart* v. *Kingsale.* (4)

Timins, for the late life tenant's executors.

The true rule is to divide the amount realized in the proportion which arrears of interest bear to capital, the life estates not being liable to bring any income into hotchpot: *In re Moore* (5); *In re Alston.* (6)

[SWINFEN EADY J. The question of hotchpot was not raised in *In re Moore* (5); and in *In re Alston* (6) Kekewich J. certainly intended to apply Lord Cottenham's rule in *Turner* v. *Newport.* (7) The only real question is from what date the account ought to be taken. The proper course would be to take it from the date when the security was first ascertained to be insufficient, the life estates bringing income received from that date into hotchpot.]

In that case the account should be taken from April 6, 1898, when the income first fell into arrear. As North J. ordered the interest then due to be paid to the late life tenant, it must be assumed that the security was then sufficient.

Marcy, for the remainderman. The account must be taken from the time the parties first became entitled to the investment, i.e., in this case, the testator's death: *Cox* v. *Cox* (1); *In re Foster* (2); *In re Bird.* (3)

[SWINFEN EADY J. In *Cox* v. *Cox* (1) the bond was insufficient at the testator's death; and in *In re Bird* (3) the security was unauthorized, and as such insufficient ab initio. The report of *In re Foster* (2) does not state whether the account was taken from 1862, when the security was ascertained to be

(1) (1869) L. R. 8 Eq. 343.
(2) (1890) 45 Ch. D. 629.
(3) [1901] 1 Ch. 916.
(4) [1902] 1 I. R. 496.
(5) (1885) 54 L. J. (Ch.) 432.
(6) [1901] 2 Ch. 584.
(7) (1846) 2 Ph. 14.

insufficient, or from 1845 and 1850, the dates of the advances, and I do not understand on what principle it could have been taken during the period that the security was sufficient.]

Kirby, for the trustees.

Gent, in reply. The amount realized shews that the security was insufficient throughout; but even if the account is taken from February 20, 1893, when the trustees found themselves unable to realize it, the estate of the late life tenant will get nothing.

[SWINFEN EADY J. Did not North J. in effect decide that the security was sufficient on April 6, 1898?]

No. The only effect of his order was that the late life tenant received the 966*l.* interest without liability to refund. The amount of the loss had not then been proved. But it is clear that the security was ascertained to be insufficient on February 20, 1893.

SWINFEN EADY J. The question is how the 8000*l.* obtained on the realization of the security ought to be apportioned between the successive life estates and the corpus. It appears that, in pursuance of North J.'s order of November 9, 1898, the whole of the 966*l.* paid by the mortgagor for interest from April 18, 1897, to April 6, 1898, was paid to the late life tenant as income, and it is not suggested that this or any previous payment should be disturbed, or that her estate is liable to recoup any part thereof. But the question is whether her executors are entitled to any further sum. The point arises in this way. The testator invested 25,000*l.* (subsequently reduced to 20,000*l.*) on a leasehold mortgage which has ultimately realized only 8000*l.* The question is how this sum ought to be apportioned. At one time during the course of the argument I was inclined to think that I could not go behind North J.'s order, and that in taking the account for the purpose of apportionment I must draw the line at April 6, 1898, treating the security as sufficient up to that date, and dividing the 8000*l.* in the proportion which the arrears of income from that date up to the date of realization bear to the capital, the life estates having received nothing during that

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period. But I am satisfied that North J. only decided that the late life tenant was entitled to receive the 966*l.* interest without liability to refund, and did not decide whether or not she must bring this or any previous payment into hotchpot on claiming an apportionment of the amount ultimately realized.

The real question is from what date the account should be taken. Should it be taken from the testator's death, or from February 20, 1893, when the mortgage became payable and it appeared that the security was insufficient, or from April 6, 1898, when the income first fell into arrear? In my opinion the account should be taken from the date when it was first ascertained that the security was insufficient. That was on February 20, 1893. From the testator's death down to February 20, 1893, the late life tenant received the full income as of a proper and sufficient security. On February 20, 1893, it appeared that the security was insufficient, but she still received the income up to May 6, 1898. Now if the account were taken from February 20, 1893, up to the date of realization, and the amount received by the late life tenant during that period brought into hotchpot, her estate would get nothing, as the apportioned sum would be less than the amount she received. It is therefore useless to direct any computation in that respect. The whole fund belongs to the present life tenant and the remainderman. The present life tenant has received no income in respect of this property. The fund must therefore be divided in the proportion which the interest at 5 per cent. on 20,000*l.* from January 21, 1900, when the present life tenant came into possession, up to September 29, 1902, the date of realization, bears to 20,000*l.*

Solicitors: *Burgoynes & Greatbach; Nicholson, Patterson & Freeland.*

G. R. A.

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[1902 J. 674.]

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Trustee—Breach of Trust—Unauthorized Investment—Partly paid Shares—Death of Co-trustee—Call on Shares—Contribution.

March 24, 25.

Two trustees in breach of trust invested trust funds in partly paid shares of a company.

Some years after the death of one trustee, the survivor, who had made every reasonable effort to dispose of the shares, but without success, paid a call of 800*l.* as a contributory in the liquidation of the company:—

Held, that the deceased trustee's representatives, though not liable to the company for the call, were liable to the surviving trustee for contribution.

Ashhurst v. *Mason*, (1875) L. R. 20 Eq. 225, explained and applied.

WITNESS ACTION.

In June, 1896, the plaintiff and J. E. Dickinson, being trustees of a settlement, invested 476*l.*, part of the trust funds, in the purchase of 400 shares in the Cheque Bank, Limited. The shares were then 5*l.* apiece with 1*l.* paid up, but on a subsequent reduction of capital the liability was reduced to 2*l.* a share.

This investment, which was unauthorized, was made after due consultation between the trustees and their brokers with the view of assisting the life tenant, a widow in poor circumstances. An interim dividend of 10 per cent. had just been declared, and the shares stood well in the market. The liability was reserved as a special guarantee fund for the cheques; and as, by the practice of the bank, cheques were only issued against the full amount deposited, the maximum value of each cheque being indicated thereon, there was apparently little risk of a call.

Owing, however, to various causes the shares fell heavily in value, and from the end of 1896 they were unsaleable.

On June 20, 1897, J. E. Dickinson died, having appointed the defendants his executors, and the bank in due course placed the shares in the sole name of the plaintiff.

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The plaintiff made efforts through various firms of brokers to sell the shares, but without success, as there was no market. He did not communicate directly with the defendants in the matter, one of them being in Belfast and the other being a lady; but he mentioned the matter more than once to Harris Dickinson, the secretary of the company into which J. E. Dickinson's business at Liverpool had been converted pursuant to the directions of his will, assuming that, as he opened all letters addressed to J. E. Dickinson, procured the death certificate for the plaintiff, produced the probate to him, and forwarded him circulars relating to the shares, he in fact represented the defendants.

In 1901 the bank went into liquidation, and a call of 2*l.* a share was made, in respect of which the plaintiff paid 800*l.*

The defendants having refused to pay half this amount, the plaintiff brought this action to enforce his right of contribution in respect of the call, and in respect of the loss sustained by the estate owing to the unauthorized investment.

The defendants admitted their liability to contribution in respect of the loss sustained by the estate, but disputed any liability in respect of the call.

The plaintiff relied on certain correspondence and other evidence to shew that at the time the unauthorized investment was made it was agreed that the trustees should contribute equally to any liability arising therefrom. He also contended that, even if the evidence failed to substantiate any such agreement, he was still entitled to contribution.

The defendants, who submitted that the evidence failed to establish any such agreement, contended that the plaintiff had no right of contribution in respect of the call, and that if he ever had such a right he had lost it by retaining the shares for nearly four years without consulting them. They stated that they did not know of the shares till after the call.

It was assumed throughout the case that the liability on the shares was merely a joint liability, so that the defendants were not directly liable for the call.

Eve, K.C., and *Frederic Thompson*, for the plaintiff. Assuming that there was no special agreement for contribution, the plaintiff is still entitled under the ordinary principles of equity. The fact that the liability has arisen out of the joint act of the plaintiff and his co-trustee entitles the plaintiff to contribution: *Ashhurst* v. *Mason* (1); Lindley on Companies, 6th ed. p. 532.

The fact that the plaintiff retained the shares does not deprive him of this right. If the cestuis que trust had repudiated the shares, the plaintiff would have held them on trust for himself and the defendants. As between the plaintiff and the defendants the investment must be treated as authorized, so that his only duty towards them was to act as a prudent trustee: *In re Chapman*. (2) The shares were unsaleable in the market, and he had no right to throw them away. He was entitled to assume that Harris Dickinson represented the defendants; and in any case the defendants could not have obtained an order compelling him to sacrifice the shares, in the absence of the cestuis que trust: *Butler* v. *Butler*. (3)

Hon. E. C. Macnaghten, K.C., and *Rotch*, for the defendants. The right to contribution only arises where two persons are liable to be sued for the same debt or liability. If one only is sued, he has a right of contribution against the other: *Dering* v. *Earl of Winchelsea* (4); *Stirling* v. *Forrester* (5); *Craythorne* v. *Swinburne* (6); *Duncan, Fox & Co.* v. *North and South Wales Bank*. (7) The defendants must contribute to the loss sustained by the trust estate, as they could be sued for that loss. But the call on the unauthorized investment has nothing to do with the trust estate; and as the defendants, not being shareholders, were not liable to the bank, no case of contribution arises. The plaintiff has under the circumstances become absolutely entitled to the shares cum onere.

In *Ashhurst* v. *Mason* (1) Ashhurst had consented to have two lots of partly paid shares of a company placed in the names of himself and Leyland as trustees for the company on the

(1) L. R. 20 Eq. 225, 233.
(2) [1896] 2 Ch. 763, 776.
(3) (1877) 7 Ch. D. 116, 120.
(4) (1787) 1 Cox, 318; 1 R. R. 41; 2 W. & T. 7th ed. p. 535.
(5) (1821) 3 Bli. 575, 596; 22 R. R. 69.
(6) (1807) 14 Ves. 160; 9 R. R. 264.
(7) (1880) 6 App. Cas. 1, 12, 19.

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representation that his co-directors would indemnify him, the transaction being ultra vires. It was held that he was entitled to contribution for a call he had paid, and which Leyland was unable to pay. But in that case the co-directors were liable for the call, as, if Ashhurst had been unable to pay, the company could have sued them directly.

[SWINFEN EADY J. They might possibly have been sued for misfeasance, but certainly not for the call.]

At all events, the express agreement to indemnify distinguishes that case from the present.

[SWINFEN EADY J. The alleged agreement was made with different directors in the case of each lot of shares. In neither case would the absent directors have been bound. The judgment is not founded on the existence of any such agreement, the evidence on the point being merely mentioned at p. 234 to shew that the possible liability was present to the minds of Ashurst and certain other directors.]

In any case the plaintiff ought to have communicated directly with the defendants, who might have preferred to pay something to get rid of the possible liability. He was not justified in assuming that they were represented by Harris Dickinson; and, as he chose to act without consulting them, they cannot be treated as in pari delicto, and are therefore not liable to contribution: *Chillingworth* v. *Chambers*. (1)

Eve, K.C., in reply. It is contended that the plaintiff is not entitled to contribution, because the defendants were not liable for the call. But the right of a trustee or surety to contribution is an equitable right arising out of the mutual trusteeship or suretyship, and is not limited by the right of the creditor: *Badeley* v. *Consolidated Bank* (2); *Wynne* v. *Tempest* (3); *Steel* v. *Dixon*. (4) It may be enforced against the estate of a deceased trustee or surety: *Ramskill* v. *Edwards*. (5) In the case of a joint bond by sureties, the survivor would alone be liable on the bond, but the estate of a deceased obligor would be liable to contribution. In the same way a surviving partner

(1) [1896] 1 Ch. 685, 701, 707.
(2) (1886) 34 Ch. D. 536, 556.
(3) [1897] 1 Ch. 110.
(4) (1881) 17 Ch. D. 825.
(5) (1885) 31 Ch. D. 100, 111.

would be entitled to contribution from the estate of a deceased partner for posthumous calls on shares that they had held jointly. The plaintiff is, therefore, entitled to contribution.

SWINFEN EADY J., after stating that in his view the correspondence and other evidence shewed that the trustees when making the unauthorized investment had agreed to contribute equally to any liability arising therefrom, continued:—If that is so, there is an end of the case, the plaintiff being entitled to contribution under the agreement. But I do not think it right to rest my judgment on that point alone. What was the legal position of the trustees, apart from any such agreement? The unauthorized investment was a breach of trust for which both trustees were liable. But who were entitled to the shares? It is clear that the plaintiff and J. E. Dickinson held them as trustees, and that the cestuis que trust could have claimed them if they wished. *Butler* v. *Butler* (1) shews that one trustee could not have obtained an order compelling his co-trustee to join in realizing the shares, in the absence of the cestuis que trust, who had a right to be heard on the question. But suppose the cestuis que trust had rejected the shares and claimed to have the trust funds made good by the trustees or their representatives. To whom would the shares have belonged in that event? They would clearly have belonged to the trustees or their representatives, and the survivor could not have claimed them absolutely for himself. They might have increased considerably in value, and I am clearly of opinion that the survivor could not have claimed them. On the death of J. E. Dickinson, therefore, the plaintiff did not become the sole legal and equitable owner of the shares.

Again, if the cestuis que trust had repudiated the shares and taken proceedings against the trustees or their representatives to compel them to make good the trust funds, either trustee or his representatives might have required the shares to be sold and applied pro tanto for that purpose. In such a case it would have been impossible for the plaintiff to have claimed the shares as his own as survivor in the joint account. On

(1) 7 Ch. D. 116, 120.

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repudiation by the cestuis que trust, the defendants would have been entitled to claim half the benefit of any rise in value of the shares, or to have them realized and applied pro tanto to making good the loss to the trust estate. The plaintiff would in fact have held the shares on trust for himself and the defendants, and the defendants are liable to contribution on that footing.

It was contended that the liability to contribution only arose where both parties were liable to be sued for the same debt or liability. But in *Ashhurst* v. *Mason* (1) two lots of shares of a company were (pursuant to an ultra vires resolution of the board) transferred into the names of Ashhurst, a director, and Leyland, the manager, in trust for the company. Ashhurst had subsequently to pay calls on both lots of shares, Leyland being unable to pay. Ashhurst thereupon sued his co-directors for contribution. Now the co-directors were not liable at law as contributories as they did not hold the shares. If the company had been unable to recover the call from Ashhurst, the co-directors might possibly have been liable for their misfeasance in placing the shares in the name of a man unable to pay. But they were not liable for the call, which was the liability in respect of which contribution was claimed. Ashhurst, nevertheless, recovered contribution in respect of this call. It was contended that there was a special contract in that case. But even if it existed it did not bind all the directors, nor did it bind the same directors in respect of each lot of shares. Moreover Bacon V.-C. stated the facts quite independently of the alleged contract, and held on those facts that the co-directors were liable to contribution. After stating that the board had arranged that Ashhurst and Leyland should take the shares and hold them in trust for the company, he said: "They thought it was beneficial, for the company did not know, as I am very willing to believe, that it was beyond the powers of them as directors, or of the company however represented, to acquire shares. Accordingly, that piece of machinery having been resorted to, and resorted to by persons who counsel it and who act in it, if and when a

(1) L. R. 20 Eq. 225, 233.

liability arises, no matter from what cause or by what accident, it would be, in my opinion, against the very first principles of law and justice to say that any of them who have caused this thing to be done should escape from the consequences that ensue. That is really the whole case, and, as alleged upon the bill, it is, I think, sufficiently proved." That statement of the law is quite apart from the allegation as to the existence of a special contract.

On these several grounds I think it is clear that, as well before as after the death of J. E. Dickinson, he or his estate was liable to contribution.

The only question that remains is whether the position was affected by the fact that the plaintiff retained the shares after J. E. Dickinson's death. Now the position of a trustee with regard to falling securities is dealt with in *In re Chapman* (1) where Lindley L.J. says: "There is no rule of law which compels the Court to hold that an honest trustee is liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties. Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgment." In the present case the securities were unauthorized; but J. E. Dickinson consented to the investment, and retained them jointly with the plaintiff until his death. After the death of J. E. Dickinson I am of opinion that the plaintiff acted with perfect honesty and great prudence, taking the course that was best for the interest of all parties and acting under proper advice. It was probably the only course that he could have taken under the circumstances. After November, 1896, there was no market for the shares, and no dealer would make a price. The jobber who dealt in the shares stated that after that date they were only sold by negotiation, i.e., where he had both a buyer and seller ready. They were sold on one occasion at 2*d.* a share. On another occasion the seller paid 1*s.* 10*d.* a share to be relieved of them. But these were all exceptional transactions; and if the plaintiff

(1) [1896] 2 Ch. 763, 776.

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had merely instructed his brokers to sell on any terms, and such terms as these had been obtained, it would at once have been said that a trustee was not entitled so to act with trust funds. On the other hand, I am satisfied that unless that had been done the shares could not have been sold. It appears that attempts to dispose of them were made through several channels, namely, two firms of brokers in Liverpool and one in London. But the attempts were unsuccessful, as there was no market, and no one would make an offer for them. Under these circumstances, I am of opinion that the mere fact that the plaintiff did not communicate directly with the defendants does not disentitle him to recover contribution. The defendants say that they did not know of the shares till after the call. But Harris Dickinson, the secretary of the limited company into which J. E. Dickinson's business was converted, on receiving a circular as to the shares, knew at once that they were trust securities. It was Harris Dickinson who opened all letters addressed to J. E. Dickinson after his death, who forwarded circulars as to the shares to the plaintiff, who sent the plaintiff the death certificate and produced the probate; and I think the plaintiff was justified in assuming that Harris Dickinson represented the defendants.

The plaintiff is, therefore, entitled to contribution.

Solicitors: *H. Forshaw & Hawkins, Liverpool; Walker, Son & Field, for A. M. Hannay & Horton, Liverpool.*

G. R. A.

C. A.
1903
May 16.

In re TOLLEMACHE.

[1902 T. 992.]

Trust—Administration—Management—Investment, Unauthorized Change of—Emergency—Sanction of Court—Jurisdiction.

The rule laid down in *In re New*, [1901] 2 Ch. 534, as to the exercise by the Court of its extraordinary jurisdiction in relation to the administration of trusts, in sanctioning acts by trustees going beyond the express provisions of the trust instrument, is limited to cases of emergency, and does not cover every case in which a particular act is desired to be done merely because it appears beneficial to the estate. For instance, the Court will not sanction an unauthorized change of investment proposed on the mere ground that it will be to the advantage of the beneficiaries.

Decision of Kekewich J., ante, p. 457, affirmed.

APPEAL from Kekewich J. (1)

The facts are fully stated in the report below.

The question, raised upon the application by the tenant for life of personal estate under certain wills, was whether the trustees of the wills could, with the sanction of the Court, take over a security of a description not authorized by the terms of the trust. The security consisted of a mortgage by the tenant for life of her life estate, and the ground of the application was that the proposed transaction would be for the benefit, not only of the tenant for life, but also of all the other cestuis que trust.

Kekewich J. held that, as the proposal was not one arising out of an emergency in the administration of the trust, but merely one for a change of investment not authorized by the trust, it was not a proposal to which the Court should, in the exercise of its extraordinary jurisdiction, give its sanction, and therefore refused the application.

The applicant appealed.

Warrington, K.C., and *G. R. Northcote*, for the applicant. This is a question of administration or management, and we submit that the case is one in which the Court may properly

(1) Ante, p. 457.

C. A. 1903 TOLLEMACHE, *In re.*

authorize the proposed investment, it being in the interests of all the cestuis que trust: *Brooke* v. *Lord Mostyn* (1); *In re New*. (2) We admit we must bring ourselves within the rule laid down by the Court of Appeal in the latter case. Again, this is a case in which the trustees, if they took upon themselves to commit this beneficial breach of trust, would be relieved by the Court from liability, under the powers given to it by s. 3 of the Judicial Trustees Act, 1896. If so, we submit that the Court may make an order under that section relieving the trustees by anticipation.

Hornell, for the respondents, the children of the applicant, was not called upon.

Brabant, for the trustees.

VAUGHAN WILLIAMS L.J. It is admitted that the applicant cannot succeed unless she can bring herself within *In re New*. (2) Putting that case shortly, it is this—that a case may arise in which, in the course of the administration of an estate, such an emergency may occur that it must be dealt with at once; but it cannot be said that there is any such emergency here. The appeal must, therefore, be dismissed, and with costs.

ROMER L.J. I agree. *In re New* (2) shews how far the Court will go, and beyond what point it will not go.

COZENS-HARDY L.J. I agree. I will only add that, in my opinion, *In re New* (2) constitutes the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts.

Solicitor: *J. Bertram.*

(1) (1864) 2 D. J. & S. 373, 415. (2) [1901] 2 Ch. 534, 544.

G. I. F. C.

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—— Trustees — Solicitor of tenant for life — Existing trustees—Affidavit of fitness
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ASSIGNMENT — *Priority — Reversionary Trust Fund—Notice to one of several Trustees—Death of Trustee who had Notice.*

In a contest for priority between assignees of a reversionary interest in a trust fund where one only of several trustees has notice of an assignment and dies, a subsequent assignee who gives notice of his assignment to the then existing trustees is entitled to priority over the prior assignee:—

So *held* on the authority of *Timson* v. *Ramsbottom*, (1837) 2 Keen, 35; 44 R. R. 183. *In re* PHILLIPS' TRUSTS - - **Kekewich J.** 183

—— Forfeiture clause—Dispose or attempt to dispose of—Assignment to trustees of marriage settlement - - 715
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—— Partners, Payment of salaries to—Right of assignee of share to interfere - 236
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ATTACHMENT—*Practice—Notice of Motion for Attachment—Form of Notice—Extension of Time—Service of Order—Four-day Order.*

Before leave to issue a writ of attachment can be obtained, for non-compliance with an order within the time therein limited as extended by a second order, both orders must be served; or if the extended time given by the second order has expired before that order has been drawn up, a four-day order must be obtained and served before moving for attachment. *In re* SEAL (A SOLICITOR). *In re* SEAL & EDGELOW (SOLICITORS) **Byrne J.** 87

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BURIAL — *Burial Ground — "Open Space" — Hoarding to prevent Acquisition of adjoining Owner's Right to Light — "Building" — Non-joinder of Attorney-General—Metropolitan Open Spaces Act*, 1877 (40 & 41 *Vict. c.* 35), *s.* 1—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *ss.* 4, 5—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

A churchyard was an "open space" within the Metropolitan Open Spaces Acts, 1877 and 1881, and a "disused burial ground" within the Disused Burial Grounds Act, 1884. Under the Acts of 1877 and 1881 it was to be held for the perpetual use thereof by the public for "exercise and recreation" "in an open condition free from buildings," except (as provided by the Act of 1884) for the purpose of enlarging the existing church.

The plaintiff, shortly before action, erected buildings on land abutting on the churchyard, with windows overlooking it. The local authority (having control over the churchyard as an open space) thereupon resolved to erect a hoarding in it to obstruct the access of light to the plaintiff's windows with a view to preventing him from gaining a prescriptive right to the access of light over the churchyard, and the plaintiff brought an action for an injunction to restrain them from doing so:—

Held, (1) that, as the plaintiff was suing either in respect of an alleged private right to the access of light, or in respect of an alleged interference with a public right from which he personally sustained special damage, he could sue without joining the Attorney-General as a plaintiff; but (2) that the Acts did not create any easement of light or otherwise for the benefit of adjoining owners, or any right other than a right in the public to enjoy the churchyard as an open space (subject to the right to extend the church); (3) that the hoarding was not a build-

BURIAL—*continued.*
ing within s. 5 of the Act of 1881 or s. 3 of the Act of 1884.
The action was accordingly dismissed.
A plaintiff can sue without joining the Attorney-General in two cases, (*a*) where an interference with a public right involves interference with some private right of the plaintiff; and (*b*) where no private right of the plaintiff is interfered with, but he, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. BOYCE *v.* PADDINGTON BOROUGH COUNCIL BUCKLEY J. **109**

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—— *Blackmore* v. *Yates* (1867) L. R. 2 Ex. 225
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—— *Day* v. *Day* - - (1845) 9 Jur. 785
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—— *Emmins* v. *Bradford* (1880) 13 Ch. D. 493
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—— *Finchley Electric Light Co.* v. *Finchley Urban District Council*, [1902] 1 Ch. 866.
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—— *Foley* v. *Burnell*, (1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319.
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—— *Fullerton* v. *Martin*, (1853) 22 L. J. (Ch.) 893.
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—— *Greenwood, In re. Goodhart* v. *Woodhead*, [1902] 2 Ch. 198.
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—— *Grieves* v. *Rawley* - (1852) 10 Hare, 63
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—— *Handford* v. *Storie*, (1825) 2 S. & S. 196; 34 R. R. 272, n.
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—— *Hatch* v. *Hatch*, (1804) 9 Ves. 292; 7 R. R. 195.
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—— *Hetling and Merton's Contract, In re*, [1893] 3 Ch. 269.
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—— *Highett and Bird's Contract, In re*, [1902] 2 Ch. 214.
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—— *Hilton* v. *Hilton* (1872) L. R. 14 Eq. 468
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—— *Holman* v. *Loynes* (1854) 4 D. M. & G. 270
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—— *Humble* v. *Shore*, (1847) 7 Hare, 247; 1 H. & M. 550, n.
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—— *Ingle* v. *Vaughan Jenkins* [1900] 2 Ch. 368
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—— *Jared* v. *Clements* - [1902] 2 Ch. 399
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—— *Jodrell, In re*, (1890) 44 Ch. D. 590; [1891] A. C. 304.
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—— *Johnson* v. *George Newnes, Limited*, [1894] 3 Ch. 663.
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—— *Kekewich* v. *Manning*, (1851) 1 D. M. & G. 176.
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—— *Lambert, In re* - - [1897] 2 Ch. 169
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—— *Lawes, In re* - - (1881) 20 Ch. D. 81
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—— *London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135.
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—— *Longley* v. *Longley*, (1871) L. R. 13 Eq. 133.
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—— *Lyne's Trust, In re* (1869) L. R. 8 Eq. 65.
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—— *Mare, In re* - - [1902] 2 Ch. 112
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—— *Martelli* v. *Holloway,* (1872) L. R. 5 H. L. 532.
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—— *Maunder, In re. Maunder* v. *Maunder,* [1902] 2 Ch. 875.
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—— *Meek* v. *Kettlewell,* (1842) 1 Hare, 464; (1843) 1 Ph. 342; 58 R. R. 137.
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—— *Merrill* v. *Morton* - (1881) 17 Ch. D. 382
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—— *Moggridge* v. *Thackwell,* (1803) 7 Ves. 36; 6 R. R. 76.
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—— *Pankhurst* v. *Howell,* (1870) L. R. 6 Ch. 136
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—— *Philpotts* v. *James* - (1784) 3 Doug. 425
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—— *Pollock, In re* - (1885) 28 Ch. D. 552, 556
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—— *Powell* v. *Powell* - [1900] 1 Ch. 243
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—— *Prestwich* v. *Poley,* (1865) 18 C. B. (N.S.) 806.
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—— *Price, In re* - - [1900] 1 Ch. 442
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—— *Rawes* v. *Rawes,* (1836) 7 Sim. 624; 5 L. J. (N.S.) (Ch.) 114; 40 R. R. 191.
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—— *Read, In re* - - [1894] 3 Ch. 238
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—— *Rees, In re* - - (1881) 17 Ch. D. 701
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—— *Richards* v. *De Winton. Richards* v. *Evans,* [1901] 2 Ch. 566; [1902] W. N. 113.
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—— *Saccharin Corporation, Limited* v. *Dawson,* (1902) 19 Rep. Pat. Cas. 169.
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—— *Saccharin Corporation, Limited* v. *Quincey,* [1900] 2 Ch. 246; 17 Rep. Pat. Cas. 337.
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Applied by Buckley J. KIRBY-SMITH *v.* PARNELL - - **[1903] 1 Ch. 483**

—— *Scarsdale (Lord)* v. *Curzon,* (1860) 1 J. & H. 40.
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—— *Slater's Trusts, In re* (1879) 11 Ch. D. 227
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—— *Smith* v. *Lidiard* - (1857) 3 K. & J. 252
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—— *Stamford (Earl of), In re,* [1896] 1 Ch. 288
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—— *Stoddart* v. *Saville* - [1894] 1 Ch. 480
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—— *Sullivan* v. *Mitcalfe*, (1880) 5 C. P. D. 455, 464.
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—— *Taylor* v. *Taylor* - (1875) L. R. 20 Eq. 155
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—— *Tebb* v. *Cave* - - [1900] 1 Ch. 642
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—— *Timson* v. *Ramsbottom*, (1837) 2 Keen, 35; 44 R. R. 183.
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—— *Tollemache, In re* - [1903] 1 Ch. 457
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—— *Wall* v. *Byrne* - (1845) 2 J. & Lat. 118
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—— *Watson's Trusts, Re* - (1886) 55 L. T. 316
Not followed on one point by Swinfen Eady J. *In re* SMITH'S SETTLEMENT. WILKINS *v.* SMITH - **[1903] 1 Ch. 373**

—— *Watts* v. *Bucknall* - [1902] 2 Ch. 628
Affirmed by C. A. - **[1903] 1 Ch. 766**

—— *Wells* v. *Wells* - (1874) L. R. 18 Eq. 504
Considered by Swinfen Eady J. *In re* COZENS. MILES *v.* WILSON **[1903] 1 Ch. 138**

—— *Wilson, In re* - - (1886) 54 L. T. 600
Applied by Kekewich J. in *In re* BARROW-IN-FURNESS CORPORATION AND RAWLINSON'S CONTRACT [1903] 1 Ch. 339

—— *Wilson* v. *Atkinson* (1864) 4 D. J. & S. 445
Considered by Swinfen Eady J. *In re* SMITH'S SETTLEMENT. WILKINS *v.* SMITH **[1903] 1 Ch. 373**

CASES—*continued.*

—— *Withers* v. *Parker*, (1859) 28 L. J. (Ex.) 292; on appeal, (1860) 29 L. J. (Ex.) 320.
Dicta in, approved and applied by Farwell J. *In re* NEWEN **[1903] 1 Ch. 812**

—— *Woods and Lewis' Contract, In re*, [1898] 1 Ch. 433; [1898] 2 Ch. 211.
Discussed by C. A. BENNETT *v.* STONE **[1903] 1 Ch. 509**

—— *Woolfe* v. *Automatic Picture Gallery, Limited*, [1902] W. N. 137.
Affirmed by C. A. - **[1903] 1 Ch. 18**

—— *Young and Harston's Contract, In re*, (1885) 31 Ch. D. 168, 174–5.
Referred to by C. A. BENNETT *v.* STONE **[1903] 1 Ch. 509**

CHARITY — *Indefinite Objects — Disposition of Funds — Scheme or Sign Manual — Practice — General Charitable Intention.*

Where property is bequeathed to executors or trustees for charitable purposes, and the objects are not specified or indefinite, the proper mode of carrying out the general charitable intention of the testator is by a scheme under the Court; but where there is a general charitable intention without any trust interposed, the disposition of the gift is in the King by Sign Manual.

Moggridge v. *Thackwell*, (1803) 7 Ves. 36; 6 R. R. 76, and *Paice* v. *Archbishop of Canterbury*, (1807) 14 Ves. 364, applied. *In re* PYNE. LILLEY *v.* ATTORNEY-GENERAL - - **Byrne J. 83**

2. —— *Institute—Gift for Benefit of a named Institute—Institute erected for general Benefit of Inhabitants—Use for Purposes not strictly charitable—General Charitable Intention.*

A testatrix gave 3000*l.* to trustees to be applied at their discretion for the benefit of the Mann Institute. The Mann Institute had been erected by the testatrix for the general benefit of the inhabitants of Moreton-in-Marsh. The building had never been conveyed to trustees, nor had any charitable trust thereof been created. It remained in the testatrix's own control, and had been used for purposes beneficial to the inhabitants:—

Held, that the bequest of 3000*l.* was a good charitable gift, and a scheme must be directed for its application. *In re* MANN. HARDY *v.* ATTORNEY-GENERAL - - **Farwell J. 232**

3. —— "*Land*"—*Gift to Charity—Devise of Real Estate in Trust for Sale—Share of Rents until Sale—Consent of Tenant for Life—Vesting in Official Trustee—Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5, 6.

A testator, who died in 1900, gave all his real and personal estate to trustees upon trust for conversion, but directed that no part of his freeholds and leaseholds should be sold during the lifetime of his wife without her consent in writing. The income arising from this estate, and the rents of the unsold portion thereof, were distributable during the life of the widow—one-fourth to her, and the remaining three-fourths between four named charities, to which, after the death of the widow, the whole of the residuary estate was eventually given. On an application by the trustees for the opinion of the Court

CHARITY—*continued.*
whether the directions for sale and vesting contained in ss. 5 and 6 of the Mortmain and Charitable Uses Act, 1891, applied to this gift:—

Held, that there were two interests given to the charities, the one a reversionary interest which was not "land" within the meaning of the Act, and the other an immediate terminable interest in the income of land which the trustees were expressly forbidden to sell during the lifetime of the widow without her consent; no consent having been given, and the land from which the income arose being still unconverted at the expiration of a year from the testator's death, the interest in this income was "land" within the meaning of the Act, and that it was now vested by force of s. 6 in the Official Trustee of Charity Lands. *In re* RYLAND. ROPER *v.* RYLAND - - - - Byrne J. 467

4. —— *Sale of Land — Purchase-money in Court—Payment out—Trustees with Power of Sale —Persons absolutely entitled—Consent of Charity Commissioners—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 69; *Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 17.

Trustees of a charity, who have power with the consent of the bishop to sell the charity land and to give a full discharge for the money paid therefor, are persons "absolutely entitled" within s. 69 of the Lands Clauses Consolidation Act, 1845; and the purchase-money of land of the charity, which has been paid into court under that Act, can be ordered to be paid out to them without the consent of the Charity Commissioners. *In re* LORD MAYOR OF SHEFFIELD AND THE TRUSTEES OF ST. WILLIAM'S ROMAN CATHOLIC CHAPEL AND SCHOOLS, SHEFFIELD Byrne J. 208

CIRCULARS — Trade-mark — Infringement — Circulars - - - - 211
See TRADE-MARK.

CLASS—"My own nephews and nieces"—Half-blood - - - - 138
See WILL. 6.

CLOCK—Fixed to outside of house—Breach of lessee's covenant—"Alteration" 158
See LANDLORD AND TENANT. 1.

CLUB—*Alteration of Rules—Raising Subscription —Expulsion of Member—Injunction.*

A club which is governed by rules prescribing the amount of the annual subscription, but not containing any provision for the amendment or alteration thereof, cannot by a resolution passed by a majority of the members present at a general meeting raise the amount of the subscription so as to bind existing members, and the Court will interfere by injunction to restrain the expulsion of a dissentient member for refusing to pay the increased subscription. HARINGTON *v.* SENDALL Joyce J. 921

CODICIL—Will—Republication—Estate duty
See WILL. 5. 685

COLONY—Domicil.
See under CONFLICT OF LAWS.

COMMISSION—Company—Reconstruction—Sale of undertaking—Consideration — Ultra vires - - - - - 295
See COMPANY. 9.

COMMISSION—*continued.*
—— Payment of, to agent—Purchase and resale —Costs—Taxation - - 702
See SOLICITOR. 2.

COMMON—*Compensation for Commonable Rights —Apportionment—Determination of Persons Interested—Jurisdiction—Lands taken for Public Undertaking—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 104—*Inclosure, &c., of Land Act*, 1854 (17 & 18 *Vict. c.* 97), *s.* 17.

Appeal against the decision of Kekewich J., [1901] 2 Ch. 566; [1902] W. N. 113. RICHARDS *v.* DE WINTON. RICHARDS *v.* EVANS C. A. 507

COMPANIES WINDING-UP RULES, April, 1892, r. 20. - - - - 725
See COMPANY. 13.

COMPANY—*Debenture-holder's Action—Right of Plaintiff to discontinue after Judgment—Practice.*

The rule whereby the plaintiff in a creditor's administration action is precluded from discontinuing his action after judgment does not apply to a debenture-holder's action, the reason being that in a creditor's administration action the Court, by directing in the judgment that the estate shall be "applied in a due course of administration," takes upon itself the duty of administering the assets, whereas no such direction is contained in the usual judgment in a debenture-holder's action. Therefore, if the plaintiff in a debenture-holder's action has no notice that any other debenture-holder claims to have the benefit of the judgment, it is competent for him to discontinue his action.

Handford v. *Storie*, (1825) 2 S. & S. 196; 34 R. R. 272, n., considered. *In re* ALPHA COMPANY. WARD *v.* ALPHA COMPANY - Kekewich J. 203

2. —— *Debentures—Registration—Extending Time—Winding-up before Date of Registration—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

A company in June, 1901, executed a trust deed and issued debentures creating a charge which required registration within twenty-one days under s. 14 of the Companies Act, 1900. The charge was not registered within the twenty-one days, but on November 1, 1901, an order was made under s. 15 of the Act extending the time for registration until November 15, but "without prejudice to the rights of parties acquired prior to the time when such trust deed and debentures shall be actually registered." The charge was registered on November 15, 1901; but in the meantime—on November 11—the company passed an extraordinary resolution for voluntary winding-up:—

Held, that the rights of the general body of creditors under the winding-up were protected by the saving words of the order, and that the debenture-holders were not as against them secured creditors.

In re I. C. Johnson & Co., [1902] 2 Ch. 101, explained. *In re* ANGLO-ORIENTAL CARPET MANUFACTURING COMPANY - Buckley J. 914

3. —— *Debentures — Series of Debentures — Covering Deed—Subsequent Issue—Registration—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

On November 18, 1901, the company passed

COMPANY—*continued.*

resolutions creating a series of debentures to rank pari passu. On December 13 a covering deed was executed. On December 31 the deed and ninety-nine debentures which had been already issued were carried in for registration, together with particulars which gave the date of the deed, the total amount secured, a description of the property and the names of the trustees, but by mistake stated that the resolutions were passed on December 13, 1901. The deed and the debentures, each of which also contained a charge, were registered, and the registrar gave a certificate to that effect. On two subsequent occasions the company registered other debentures of the series, and received certificates which referred to the deed, described the debentures, and stated that they had been registered. On the last occasion, namely, on January 1, 1903, the registrar refused to register other debentures of the same series on the ground that more than twenty-one days had elapsed since their issue.

The company moved for an order to rectify the mistake in the date of the resolutions, and for an extension of the time for registering the debentures which had been rejected:—

Held, that the mistake must be corrected, and that the result of the correction would be to make the first registration valid under sub-s. 4 of s. 14 of the Companies Act, 1900; that no further registration of debentures subsequently issued was necessary; and that no order for extension of time need be made.

Observations on the scope and effect of s. 14 of the Companies Act, 1900. *In re* THE HARROGATE ESTATES, LIMITED - **Buckley J. 498**

4. —— *Director—Prosecution—Payment of Costs out of Assets—Refusal of Public Prosecutor to prosecute—Discretion—Winding-up of Company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 167.

In order to determine whether leave ought to be given to institute criminal proceedings against the director of a company which is being wound up, and whether the costs of the prosecution ought to be paid out of the assets of the company, the Court will look at the question from the point of view of an individual, and will consider whether it would be the duty of a good citizen even at a loss to himself to institute and carry on proceedings to punish the criminal. It is not necessary to find that the facts are so plain that a conviction must ensue. The proportion of creditors who support and oppose the application, and the effect which will be produced upon the estate by payment of costs, will be taken into consideration, but not the personal advantage of the individual, nor motives of vengeance against the offender, nor pecuniary benefits to be obtained for the creditors or shareholders. The fact that the law officers of the Crown have refused to allow the public prosecutor to undertake the prosecution is not necessarily relevant. *In re* LONDON AND GLOBE FINANCE CORPORATION, LIMITED - - - - **Buckley J. 728**

5. —— *Memorandum of Association—Power to sell Undertaking for Shares in another Company—Agreement to sell Undertaking for Shares in New Company—Resolution approving Agreement and*

COMPANY—*continued.*

Resolution for Voluntary Winding-up passed contemporaneously—Validity of Agreement—Rights of Dissentient Shareholders—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

Decision of Buckley J., [1902] 2 Ch. 837, affirmed. DOUGHTY *v.* LOMAGUNDA REEFS, LIMITED - - - - - **C. A. 673**

6. —— *Prospectus—Misrepresentation—Damages—Right of Action—Directors Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3.

In an action by a shareholder in a limited company against a director for damages for misrepresentations in the prospectus, the time at which the damages ought to be assessed is the date of the allotment to the plaintiff; accordingly, where the plaintiff has applied for and obtained shares upon the faith of a false representation in the prospectus that the company had already acquired a valuable property, the fact that the property is acquired shortly afterwards affords no answer to the plaintiff's claim for damages, unless it be shewn that at the date of allotment the risk that the property would not be acquired was unsubstantial.

In assessing the damages, primâ facie the price paid for the shares is taken to be the exact equivalent of the value of the shares having the advantages represented in the prospectus.

The principle upon which the damages ought to be assessed considered. MCCONNEL *v.* WRIGHT **C. A. 546**

7. —— *Prospectus—Omission to specify Material Contract—Liability of Director—"Knowingly issue"—"Waiver" Clause—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

The prospectus of a company, formed for the purpose of acquiring and working some breweries, stated that a contract for purchase, dated December 1, 1896, had been entered into between two persons, whose names were given, one of them being a trustee for the company. It was further stated that, "during the negotiations for the purchase of the properties and the formation of the company, contracts have been entered into between various parties, with reference to the formation and promotion of the company and the subscription of its capital, but to none of which the company is a party . . . . The contracts referred to in this paragraph are, or may be, contracts within the meaning of s. 38 of the Companies Act, 1867; and, accordingly, applicants for shares are to be deemed to have notice of the said contracts, and to have agreed with the company (as trustee for the directors and other persons liable) to waive all claims, if any, against them for not more fully complying with the requirements of the said section, and allotments will only be made upon this express condition." Neither the dates of nor the names of the parties to the contracts thus referred to were stated in the prospectus.

A shareholder, who had applied for his shares on the faith of this prospectus, brought an action for damages against one of the directors, who was responsible for the issue of the prospectus, on the ground that the requirements of s. 38 had not been complied with. The defendant admitted that he had read through the prospectus, but said that he knew nothing of the nature or contents of

COMPANY—*continued.*

the contracts referred to, and that he was ignorant of s. 38:—

Held, that the defendant had "knowingly issued" the prospectus within the meaning of s. 38, that he was not protected by the waiver clause, and that he was liable to refund to the plaintiff the sum which he had paid for his shares.

Decision of Byrne J., [1902] 2 Ch. 628, affirmed.

The statement in the prospectus, though it was sufficient to fix the defendant with knowledge of the existence of the contracts in question, and thus to make him liable under s. 38, as having "knowingly" issued the prospectus without specifying the contracts, was not a sufficient "notice" of the contracts within s. 38 so as to deprive the plaintiff of his remedy under that section, the position of a director and that of an applicant for shares being for this purpose entirely different.

In order that an applicant may be affected with "notice" of a contract within s. 38, he must have notice, not only of the existence of the contract, but also of its contents.

A "waiver" clause in a prospectus of this kind cannot operate to excuse compliance with the requirements of s. 38, except under such conditions as would render a release in general terms effectual. WATTS *v.* BUCKNALL **C. A. 766**

8. —— *Prospectus—Promoter—Contract—Remuneration — Bonus — Commission — Quantum Meruit — "Material" Contract—Omission from Prospectus—Legal Advice—Directors, Liability of —"Knowingly issuing" Prospectus—"Fraudulent" Prospectus—"Untrue Statement"—Shareholder, Rights of—Damages, Measure of—Compensation—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38—*Directors Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3, *sub-s.* 1.

A "contract" required by s. 38 of the Companies Act, 1867, to be specified in a prospectus means a contract that is "material"—one which, whether deterrent or not, an intending investor ought to have an opportunity of considering in order to decide whether to apply for shares or not.

The statement of Baggallay L.J. in *Sullivan* v. *Mitcalfe*, (1880) 5 C. P. D. 455, 464, as to what contracts s. 38 requires to be specified in a prospectus, approved.

On September 21, 1898, the directors of a newly incorporated company entered into a contract by letter with B., its promoter, confirmed by a resolution of October 1, that, in consideration of his advancing a sum of 14,250*l.* to enable the company to pay the deposit on its intended purchase of an undertaking introduced by him, and of his taking upon himself the risk of forfeiture of the deposit in the event of non-completion of the purchase, the company would repay the deposit by a certain day "together with 7500*l.* bonus for such loan."

The deposit was then raised by B. and paid to the vendors. Subsequently by a contract, by resolution of the directors, of October 10, 1898, between B. and the directors, upon their giving him "assurance that his right to recover proper remuneration for commission on introducing the business" of the purchase "and raising the necessary deposit shall be honourably met at a future meeting of the directors," the contract of September 21 was "cancelled," and the subject was "adjourned to a future meeting of the board."

On October 20, 1898, the directors issued a prospectus stating that certain contracts therein specified were the "only" contracts entered into by the company, no reference being made to either of the two contracts of September 21 and October 10, 1898. On the faith of that prospectus the plaintiff applied for 400 10*l.* shares in the company, which were duly allotted to him on October 26, 1898, and he paid 1000*l.* upon them.

In January, 1900, the company went into liquidation, and in December, 1901, the plaintiff brought an action against the directors claiming, under s. 38 of the Companies Act, 1867, to have the prospectus declared fraudulent by reason of the omission of the two contracts, with damages; and also, under s. 3, sub-s. 1, of the Directors Liability Act, 1890, compensation for the alleged "untrue statement" in the prospectus:—

Held, by Buckley J. and by the Court of Appeal, that both contracts were such as were material to be specified in the prospectus, and that as the defendants had, even though they might have done so innocently and on legal advice, "knowingly issued" the prospectus containing an "untrue statement," the plaintiff had established his case both under s. 38 of the Act of 1867 and under s. 3, sub-s. 1, of the Act of 1890: also that the plaintiff was entitled to damages, the measure being the difference between the price he paid for the shares and their fair value at the date of allotment: *Peek* v. *Derry*, (1887) 37 Ch. D. 541, 592. BROOME *v.* SPEAK **C. A. 586**

9. —— *Reconstruction—Sale of Undertaking —Consideration — Shares in New Company — Partly paid-up Shares, Payment in—Commission, Applying Capital for—Underwriting—Memorandum and Articles of Association—Construction—Offer of Shares for Public Subscription—Ultra Vires—Injunction—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 8, *sub-ss.* 1, 2.

A limited company formed in 1898, having by its memorandum power to sell its undertaking either for cash or for "shares in any company," entered into an agreement, with a view to reconstruction, with certain "guarantors" for the sale to them of its undertaking, the purchasers agreeing to form a new company for the repurchase of the undertaking in consideration of the allotment and issue, to such members of the old company as should accept the same, of partly paid-up shares in the new company, with power for the liquidator of the old company, on its being wound up, to sell any shares not accepted by its members.

To carry out that agreement a new company was formed in 1902, with power, by its memorandum, to pay out of its funds all expenses it might incur having regard to s. 8 of the Companies Act, 1900, including commission for underwriting shares; and clause 9 of its articles provided that if at any time it should offer its shares to the public for subscription the directors might pay a commission at a "rate" not exceeding

COMPANY—*continued.*

50 per cent. to any person in consideration of subscribing or agreeing to subscribe for shares.

An agreement was then entered into between the guarantors (the original purchasers) and the 1902 company for the "sale" to that company of the undertaking of the 1898 company in consideration of the 1902 company allotting and issuing to the guarantors its shares, partly paid up, for distribution among the members of the 1898 company, the guarantors agreeing that they by themselves or their nominees would accept an allotment of such of the shares as should not be required by the 1898 company or its liquidator; and, as the balance of the consideration for the sale, the 1902 company agreed to pay the guarantors "12,300*l.* in cash." Soon after the date of that agreement the 1898 company passed resolutions for a voluntary winding-up. No prospectus of the 1902 company had yet been issued offering any of its shares to the public for subscription.

In an action to restrain the carrying out of the latter agreement as being ultra vires:—

Held, that the sale of the undertaking of the 1898 company, so far as it was in consideration of partly paid-up shares in the 1902 company, was authorized by the memorandum of the former company; but

Held, that the additional consideration of the payment by the 1902 company of 12,300*l.* in cash was ultra vires on the grounds (1) that it was prohibited by sub-s. 2 of s. 8 of the Companies Act, 1900, as being "commission in consideration of subscribing or agreeing to subscribe for shares"; (2) that there had been no such "offer of shares to the public for subscription" as to bring the 1902 company within the protection of sub-s. 1; and (3) that the sum of cash was not a "rate" within clause 9 of that company's articles.

An injunction was therefore granted restraining the 1902 company from applying its capital in payment of the 12,300*l.*, but without prejudice to any question as to whether the company could by any means bring the payment within sub-s. 1.

Whether, in the event of a company offering some of its shares to the public for subscription, and procuring a person or persons to take up the rest in consideration of a commission, that would be a transaction validated by sub-s. 1 of s. 8 of the Companies Act, 1900, *quære*. BOOTH *v.* NEW AFRIKANDER GOLD MINING COMPANY, LIMITED
C. A. 295

10. —— *Shares, Forfeiture of—Articles of Association—Rescission of Forfeiture.*

The articles of association of a company provided that on non-payment of a call on shares the directors might forfeit the shares; that the forfeited shares should be the property of the company; that before the shares were disposed of the directors might "annul the forfeiture" upon such conditions as they thought fit; and that notwithstanding the forfeiture the shareholder should be liable to pay all calls, interest, and expenses owing in respect of the shares at the time of forfeiture.

The directors passed a resolution forfeiting the shares of L. for non-payment of a call, and gave him notice of the forfeiture. On demand L. paid the call, interest, and expenses, and at the same time wrote that he repudiated any further liability on the shares.

Nine months afterwards the directors passed a resolution purporting to rescind the forfeiture and giving notice to L. that he was registered in respect of the shares. L. replied declining to have his name reinstated as owner of the shares:—

Held, that the company had no power adversely to L. to reinstate him with the liability of a shareholder. *In re* EXCHANGE TRUST, LIMITED. LARKWORTHY'S CASE - - - Buckley J. 711

11. —— *Winding-up — Contributory — Call — Set-off — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 110.

Where a set-off is claimed or pleaded in defence to an action for a debt, the debt sued on is not thereby extinguished to the extent of the debt sought to be set off, but two separate and distinct debts remain until judgment.

When, therefore, a company, while a going concern, sues a shareholder for a call, and he sets up a defence of set-off, and before judgment is obtained a winding-up of the company commences, the defence of set-off in the action does not prevent the application of the ordinary rule that the debt owing by the company to the shareholder cannot be set off in proceedings in the winding-up to obtain payment of the call. *In re* HIRAM MAXIM LAMP COMPANY - - - Byrne J. 70

12. —— *Winding-up — Contributory — Fully paid shares — Want of Consideration — Private Company—Gift of Shares—Ultra Vires.*

Two brothers, who carried on the business of working a patent in partnership, arranged with six shipowners to form a private company to take over their business and patent rights in consideration of 6000*l.*, payable half in cash and half in shares; and it was resolved that the capital of the company should be 25,000*l.*, divided into 2500 shares of 10*l.* each, which were to be distributed as follows: The six shipowners were to take fifty shares apiece, and pay for them in cash for the purpose of raising the 3000*l.* payable in cash to the vendors, and the vendors were to take 300 fully paid shares as the balance of their purchase-money. Of the remaining 1900 shares, each of the six shipowners was to take 300 fully paid shares for his own benefit, and 100 fully paid shares were to be placed in the joint names of three of the shipowners, who became directors of the company, to be applied in rewarding persons who should bring business to the company. The company was incorporated, and the only shareholders were the vendors and the six shipowners. In order to give effect to the above arrangement, an agreement was entered into between the vendors and the company whereby the vendors purported to sell their business and patent rights to the company for 25,000*l.*, as to 3000*l.* in cash and as to 22,000*l.* by the allotment to the vendors or their nominees of 2200 fully paid shares, and this agreement was duly registered. The shares were allotted on the nomination of the vendors in accordance with the antecedent arrangement. Upon a summons by the liquidator in the winding-up of the company

COMPANY—*continued.*
against the three shipowners who were directors to render them liable as contributories:—

Held, that the agreement between the company and the vendors was a sham, and that the shares were allotted, not in pursuance of that agreement, but in pursuance of the antecedent arrangement; that the allotment of the 1900 shares was made without consideration and was ultra vires; and that the respondents were liable as contributories for the full amount of the shares respectively allotted to them. *In re* INNES & Co., LIMITED - **Kekewich J. 674**

13. —— *Winding-up—Withdrawal of Petition—Costs of Persons appearing to support or oppose—Companies Winding-up Rules, April*, 1892, *r.* 20.

When the petitioner for a winding-up order elects at the hearing to withdraw his petition, he will be ordered to pay the costs of those persons who have given notice, within the time limited by the Companies Winding-up Rules, April, 1892, r. 20, of their intention to appear—one set of costs to those supporting, and another set to those opposing. *In re* BRITISH ELECTRIC STREET TRAMWAYS - - - **Buckley J. 725**

—— Call on shares—Breach of trust—Death of co-trustee—Contribution - - **947**
See TRUSTEE. 3.

—— Incorporated by statute—Power to charge surplus lands—Existing debt - **169**
See CORPORATION.

—— Investment, Trust for—Railway or other "public company"—American company
See WILL. 10. **352**

—— Waterworks company.
See under WATER.

COMPENSATION—Lands Clauses Act—Compensation for commonable rights—Apportionment - - - **507**
See COMMON.

—— Lands Clauses Act—Compensation for personal injury, inconvenience, or annoyance - - - - - **480**
See RAILWAY.

COMPOUND SETTLEMENT—Appointment of trustees—Existing trustees—Affidavit of fitness - - - - **75**
See SETTLED LAND. 6.

COMPROMISE—Infants—Trust—Administration—Jurisdiction of Court to approve
See TRUSTEE. 1. **848**

—— Solicitor—Agent's authority—Lay client bound - - - - **812**
See SOLICITOR. 1.

CONDITION—Name clause—Condition precedent or subsequent - - - **749**
See WILL. 12.

CONFLICT OF LAWS—*Domicil—British Subject—Colonial Domicil of Origin—Subsequently acquired Foreign Domicil—Nationality—Renvoi.*

Where a British subject, whose domicil of origin is colonial, acquires according to English law a domicil of choice in a country whose laws do not recognise domicil, but distribute the movables of a foreigner dying within their jurisdiction according to the law of his nationality, and dies there, the English Courts will distribute his movables according to the law of his domicil of origin.

The testatrix was a British subject born out of wedlock in Malta. Her father was an Englishman domiciled in England; her mother was a Maltese woman domiciled in Malta. They afterwards married in Malta. The testatrix left Malta in 1832, and died in 1894 domiciled at Freiburg in Baden. She made a will, but left some movables undisposed of. It was proved that the law of Baden paid no attention to domicil, but distributed the movables of a foreigner dying in Baden, who had not been naturalized, according to the law of the country of which he was a subject:—

Held, that the testatrix's movables must be distributed according to the law of Malta, not the municipal law of England, and therefore went to her next of kin, the testatrix being legitimatized by her parents' subsequent marriage. *In re* JOHNSON. ROBERTS *v.* ATTORNEY-GENERAL. **Farwell J. 821**

2. —— *Jurisdiction—Husband and Wife—English Husband and Scotch Wife—Settlement of Wife's Property—Real Estate in Scotland—Contract in Scotch form—English Trustees—Husband's Life Interest—Alimentary Provision—Not assignable or liable to Arrestment by Creditors—Repugnance to English Law—Mortgage by Husband to English Creditors—Invalidity.*

On the marriage in Scotland of a domiciled Englishman with a domiciled Scotswoman the wife's property, consisting partly of Scotch heritable bonds (which, according to the law of Scotland, are treated as real or immovable property), was settled by a contract executed in Scotland in Scotch form. By this contract the trustees, who were the same persons as the trustees of a contemporaneous settlement of the husband's property, in English form, were to hold the property settled by the Scotch contract upon trust, in case the husband should survive the wife, to pay the income to him for life, all such payments to be "strictly alimentary, and not assignable or liable to arrestment" at the instance of his creditors. The husband survived the wife, having mortgaged his life interest to English creditors. By the law of Scotland if in such a case the husband fails to maintain the children of the marriage they are entitled to attach the alimentary provision made for him.

Upon a summons to determine the rights of the mortgagees as against the husband and an only child of the marriage:—

Held, that even if the construction and effect of the contract were properly determinable by the law of Scotland, its validity and operation with respect to the question at issue must be determined by the law of England; and that inasmuch as the prohibition against alienation of the alimentary provision was according to English law repugnant and contrary to public policy, the husband's mortgagees were entitled to receive payment of the income from the trustees. *In re* FITZGERALD. SURMAN *v.* FITZGERALD - - - - **Joyce J. 933**

CONFLICT OF LAWS—*continued.*

3. —— *Power of Appointment—Personalty—Execution—Domiciled Foreigner—Unattested Will—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 9, 10, 27.

Sect. 27 of the Wills Act, 1837—as to general devises and bequests operating as execution of general powers of appointment—is a rule of construction which attributes to a will a meaning which but for the section it would not have, and which is applicable only to those documents as to which the Courts of the United Kingdom (other than Scotland) are the Courts of construction.

Therefore, where under an English settlement there is a general power to appoint personalty by will, the power is not exercised by the will of a domiciled foreigner, valid by the law of her domicil, but not attested as required by the Wills Act, containing a general bequest of personalty, but not using words introducing the statutory rule of construction.

In re Price, [1900] 1 Ch. 442, distinguished.

In re D'Este's Settlement Trusts. Poulter *v.* D'Este - - - - **Buckley J. 898**

CONSENSUS AD IDEM — Contract — Mistake — Purchase of wrong lot - - **434**
See Vendor and Purchaser. 2.

CONSENT—Ancient lights—Enjoyment by "consent or agreement"—"Windows overlooking"—Skylight - - **405**
See Light and Air. 1.

—— Charity Commissioners—Payment out **208**
See Charity. 4.

CONSENT ORDER—Patent action—Appeal—Further evidence, Admissibility of **410**
See Patent. 2.

CONSIDERATION—Grant for services rendered—Estate tail whether barrable—Reversion in Crown - - - **865**
See Crown.

—— Sale of undertaking—Commission—Ultra vires - - - - - **295**
See Company. 9.

—— Want of—Contributory—Fully paid shares
See Company. 12. **674**

CONSTRUCTION OF WORKS—Building owner's property - - - - **690**
See Contract. 1.

CONTINGENT REMAINDER—Equitable—Remoteness—Child en ventre sa mère—Relation back - - - **874**
See Perpetuity.

—— Estate tail—Ultimate gift to "survivor's heir or heirs" - - - **744**
See Will. 7.

CONTRACT—*Construction of Works—Plant and Materials on Premises — Temporary Works—Building Owner's Property.*

The usual clause in contracts for the construction of works or for building leases, providing that all materials brought on the ground are to become the property of the building owner, must be construed as vesting the materials in the building owner, subject to a condition of defeasance if the builder completes the works. It is a security to the building owner for the performance of the work. If the contractor fails to complete he cannot recover the materials, although the building owner does not complete the works himself or by another contractor.

Ex parte Collins, [1902] 1 K. B. 555, distinguished. Hart *v.* Porthgain Harbour Company - - - - **Farwell J. 690**

2. —— *Mistake—Sale of Life Policy—Death of Assured before Contract—Common Mistake—Rescission after Completion.*

A contract for the sale of a life policy was entered into by both parties in the belief that the assured was alive, whereas he was in fact then dead. The contract was subsequently completed by assignment:—

Held, that the vendors were entitled to have the transaction set aside notwithstanding that it had been completed by assignment. Scott *v.* Coulson - - - **Kekewich J. 453**

—— Ancient lights—Enjoyment by "consent or agreement"—"Windows overlooking"—Skylight - - - - **405**
See Light and Air. 1.

—— Frauds, Statute of—Wrong date—Memorandum in writing—Consensus ad idem
See Vendor and Purchaser. 2. **434**

—— Marriage settlement.
See under Settlement.

—— "Material" contract—"Fraudulent" prospectus - - - - **586**
See Company. 8.

CONTRIBUTION—Breach of trust—Partly paid shares—Death of co-trustee—Call on shares - - - - **947**
See Trustee. 3.

CONTRIBUTORY — Company — Winding-up — Call—Set-off - - - **70**
See Company. 11.

—— Fully paid shares—Want of consideration—Gift of shares - - - **674**
See Company. 12.

CONVERSION—Real estate—Equitable limitations—Power of appointment—Appointment upon trust for sale - - **356**
See Power of Appointment. 1.

—— Remoteness—Invalid trust for sale of realty—Validity of gift - - - **565**
See Will. 14.

CONVEYANCE—Dispute as to form of—"Wilful default" - - - - **509**
See Vendor and Purchaser. 1.

CONVEYANCING AND LAW OF PROPERTY—Leasehold house—Title—Open contract—Breach of covenant to repair - **287**
See Vendor and Purchaser. 4.

—— Light—Building agreement - - **659**
See Light and Air. 2.

—— Quiet enjoyment, Covenant for—Breach—Assignee of reversion - - **797**
See Landlord and Tenant. 3.

CONVICT — Administrator — Sale of convict's property—Bona fides—Costs - **90**
See Felony.

COPYHOLD— Custody of court rolls—Lord of the manor—Steward - - - 906
See MANOR.

—— Will—Mistake—"My freehold land and hereditaments at M."—Customary freeholds - - - - - 135
See WILL. 11.

COPYRIGHT—*Encyclopædia — Article — Author and Publisher—Contributor, Payment of—Agreement—Ownership of Copyright in Contributions—Proprietor—Inference of Law and Fact—"Book separately published"—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18.

The plaintiff A. was employed by the defendants, a firm of publishers, to edit an encyclopædia on sport, and it was a term of the agreement that he should be remunerated for his editorial services by a lump sum, for which he was to contribute certain articles without further fee. The plaintiff C. was also employed by the defendants to contribute certain articles to the encyclopædia at so much per thousand words. The employment of each of the plaintiffs was the subject of a written agreement; but neither agreement contained any stipulation as to the proprietorship in the articles to be contributed.

Under their agreements both plaintiffs contributed signed articles, of the copyright in which they were registered respectively as proprietors, and these articles appeared in the encyclopædia in due course.

Subsequently the defendants published a book on sport containing copies of these articles, whereupon the plaintiffs brought an action for an injunction to restrain the defendants from republishing the articles in that form:—

Held, by Romer and Stirling L.JJ. (Vaughan Williams L.J. dissenting), that there were no special circumstances, either in the nature of the encyclopædia itself as a publication or in the terms of the employment, to justify the inference that the copyright in the articles contributed by the plaintiffs was to belong to the defendants under s. 18 of the Copyright Act, 1842; and that, on that ground—and also on the further ground that each of the signed articles was "separately published" within the meaning of those words as used in the definition of a "book" in s. 2 of the Act, so as to give the author the copyright under s. 3—the plaintiffs were entitled to an injunction.

Per Romer and Stirling L.JJ.: The mere circumstance that the writer of an article for an encyclopædia is employed and paid by the proprietor of the encyclopædia is not in itself sufficient to justify the inference, either in law or in fact, that the copyright in the article belongs to that proprietor under s. 18 of the Act.

Sweet v. *Benning*, (1885) 16 C. B. 459, commented on.

Johnson v. *George Newnes, Limited*, [1894] 3 Ch. 663, approved of.

Decision of Joyce J., [1902] 1 Ch. 264, affirmed. AFLALO *v.* LAWRENCE & BULLEN, LIMITED - - - - - C. A. 318

CORPORATION—*Statutory Corporation — Company incorporated by Statute—Power to charge Surplus Lands—Existing Debt.*

A navigating company incorporated by statute had power under a special Act (with which the Lands Clauses Consolidation Act, 1845, was not incorporated) to borrow money upon the security of a mortgage of their undertaking, but no express power was given to mortgage their surplus lands:—

Held, that the company could create a valid charge upon their surplus lands to secure an existing debt in respect of which the creditor by obtaining judgment would be able to take the surplus lands in execution under a writ of elegit.

Blackmore v. *Yates*, (1867) L. R. 2 Ex. 225, approved.

Decision of Swinfen Eady J. affirmed. STAGG *v.* MEDWAY (UPPER) NAVIGATION COMPANY C. A. 169

—— Trustee—Authorized investment—Stock of municipal borough - - 446
See TRUSTEE. 2.

COSTS—Administrator—Sale of convict's property—Bona fides - - - 90
See FELONY.

—— Company—Winding-up—Director—Prosecution - - - - 728
See COMPANY. 4.

—— Counsel's view after trial for purposes of appeal — Witness attending but not called - - - - 475
See PATENT. 1.

—— Delay - - - - - 211
See TRADE-MARK.

—— Purchase and resale—Payment of commission to agent—Costs—Taxation 702
See SOLICITOR. 2.

—— Summons for directions—Costs—Taxation
See PRACTICE. 1. 145

COUNSEL—Costs of appeal—Counsel's view after trial for purposes of appeal - 475
See PATENT. 1.

COURT OF APPEAL—Lord Chancellor sitting alone in Court of Appeal, Decision binding on - - - - 385
See MORTGAGE. 1.

COURT ROLLS—Custody of—Lord of the manor—Steward - - - - 906
See MANOR.

COVENANT—"Alteration"—Breach of lessee's covenant—Clock fixed to outside of house - - - - 158
See LANDLORD AND TENANT. 1.

—— Quiet enjoyment — Breach — Assignee of reversion - - - - 797
See LANDLORD AND TENANT. 3.

—— Settled estates—Powers—Lease—Validity—Lease to trustee for donee of power
See SETTLED LAND. 4. 836

—— Trade Fixtures—General words—Ejusdem generis - - - - 806
See LANDLORD AND TENANT. 2.

COVERING DEED—Debentures, Series of—Subsequent issue—Registration - 498
See COMPANY. 3.

CROWN — *Grant for Services rendered — Consideration—Estate Tail—Reversion in Crown—King de facto et de jure—Estate Tail whether barrable—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 18—34 & 35 *Hen.* 8, *c.* 20, *s.* 2.

A reversion to the Crown, expectant on the determination of an estate tail in realty granted by the Crown to a subject for services, being excepted by s. 18 of the Fines and Recoveries Act, 1833, from the operation of that Act, and protected by the statute 34 & 35 Hen. 8, c. 20, cannot be barred; and, although the consideration is not stated in the grant, it will be presumed after lapse of time—unless the grant on the face of it clearly shews that it is a voluntary gift—and the onus is on those who seek to take the grant out of the statute of Henry VIII. to prove the want of consideration.

But where a grant from the Crown shews on the face of it that it is a voluntary gift, the reversion expectant on the estate tail created thereunder is not within the statute of Henry VIII., and is barrable. ROBINSON *v.* GIFFARD Farwell J. 865

—— Lease — Soil of highway — Ownership—Street in town—Rebuttal of presumption *See* HIGHWAY. 118

CUMULATIVE—Substitutionary or—Successive appointments - - - 715
See POWER OF APPOINTMENT. 2.

CUSTODY—Court rolls—Lord of the manor—Steward - - - - 906
See MANOR.

—— Title-deeds—Non-negotiable securities 262
See TRUSTEE. 5.

CUSTOMARY FREEHOLDS—Misdescription of gift—Mistake - - - 135
See WILL. 11.

DAMAGES — Prospectus — Misrepresentation — Right of action - - - 546
See COMPANY. 6.

DATE—Contract—Consensus ad idem—Wrong date—Statute of Frauds - - 434
See VENDOR AND PURCHASER. 2.

DEATH — Notice to one of several trustees—Death of trustee who had notice—Priority - - - - 183
See ASSIGNMENT.

—— Sale of life policy—Death of assured before contract—Common mistake—Rescission after completion - - - 453
See CONTRACT. 2.

DEBENTURE — Debenture-holder's action — Right of plaintiff to discontinue after judgment - - - - 203
See COMPANY. 1.

—— Registration—Extending time—Winding-up before date of registration - 914
See COMPANY. 2.

—— Series of—Covering deed—Subsequent issue—Registration - - - 498
See COMPANY. 3.

DEBTS—Sale of leaseholds by executor—Actual notice to purchaser that no debts of testator remain unpaid - - 65
See VENDOR AND PURCHASER. 5.

DEEDS — Possession of title-deeds — Equitable mortgage — Notice — Fraud — Forged receipt - - - - 428
See VENDOR AND PURCHASER. 3.

—— Title-deeds — Non-negotiable securities — Custody - - - - 262
See TRUSTEE. 5.

DELAY—Costs - - - - 211
See TRADE-MARK.

DETERMINATION—Power of Sale—Duration—Absolute vesting of estate - 129
See POWER OF SALE.

DIRECTOR—Company - 546, 586, 728, 766
See COMPANY. 4—6, 8.

DISCONTINUANCE — Debenture-holder's action —Right of plaintiff to discontinue after judgment - - - - 203
See COMPANY. 1.

DISCOVERY—Affidavit of documents made on application of one defendant—Inspection by co-defendant - - - 191
See PRACTICE. 2.

DISTRIBUTION — Period of — Advancements — Hotchpot—Interest - - 889
See WILL. 3.

DIVIDENDS — "Dividend"—Waterworks company—Surplus profits - - 575
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DOMICIL.
See Cases under CONFLICT OF LAWS.

DURATION — Power of Sale—Determination—Absolute vesting of estate - 129
See POWER OF SALE.

DUTY—Public Revenue.
See under REVENUE.

EASEMENT—Exchange of easements—Settled Land Act - - - - 265
See SETTLED LAND. 2.

—— Light.
See under LIGHT AND AIR.

ELECTION—Power—Successive appointments—Cumulative or substitutionary - 715
See POWER OF APPOINTMENT. 2.

ELECTRIC LIGHT—Installation—Capital money—Engine-house - - - 560
See SETTLED LAND. 3.

ELECTRICITY—Overhead wires—Road originally acquired by turnpike trustees 437
See STREETS. 2.

EMERGENCY — Investment, Unauthorized Change of—Sanction of Court—Jurisdiction - - - - 955
See TRUSTEE. 4.

ENCYCLOPÆDIA — Ownership of copyright in contributions - - - 318
See COPYRIGHT.

ENGINE-HOUSE — Capital money — Electric lighting installation - - 560
See SETTLED LAND. 3.

EQUITABLE CONTINGENT REMAINDERS — Remoteness—Child en ventre sa mère—Relation back - - - 874
See PERPETUITY.

EQUITABLE LIMITATIONS — Real estate—Appointment upon trust for sale—Conversion - - - - 356
See POWER OF APPOINTMENT. 1.

EQUITABLE MORTGAGE — Notice — Fraud — Possession of title-deeds — Forged receipt—Priority - - - 428
See VENDOR AND PURCHASER. 3.

ESTATE DUTY.
See under REVENUE.

ESTATE PUR AUTRE VIE—*Devise of Entirety —No Words of Limitation—Intestacy of Devisee —Devolution—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 6.

A testator devised an equitable estate pur autre vie, limited to himself, "his heirs and assigns," to certain trustees, "their heirs and assigns," for the use of his grandson, describing the property as freehold hereditaments. The grandson died intestate:—

Held, that, though the entire estate had passed to the grandson, there was nothing on the face of the will to entitle his heir to claim as special occupant, and the estate therefore passed to his administrator under the Wills Act, 1837, s. 6.

Doe v. *Lewis*, (1842) 9 M. & W. 662, followed.

Philpotts v. *James*, (1784) 3 Doug. 425, distinguished.

Wall v. *Byrne*, (1845) 2 J. & Lat. 118, and *In re King*, [1898] 1 I. R. 91; [1899] 1 I. R. 30, not followed.

Held, also, that as the estate was equitable, there was no general occupancy, pending the administrator's appointment, but that when appointed he would take the entirety. *In re* INMAN. INMAN *v.* INMAN **Swinfen Eady J. 241**

ESTATE TAIL — Contingent remainder—Ultimate gift to "survivor's heir or heirs" *See* WILL. 7. 744

—— Whether barrable—Reversion in Crown *See* CROWN. 865

ESTOPPEL — *Representation — Breach of Duty —Solicitor and Client — Purchase of Land by Client—Title investigated and Conveyance prepared by Solicitor—Adverse Title to Part of Land previously acquired by Solicitor.*

After having in October, 1893, contracted to purchase a house and land, the plaintiff employed a solicitor to investigate the title and complete the purchase for him. The solicitor on investigation found that a good title was shewn to the whole of the land comprised in the contract, and he prepared a conveyance of it to the plaintiff, and on the execution of the deed the plaintiff paid his purchase-money. The solicitor was the owner of a house and land immediately adjoining that which the plaintiff had purchased, and he had in 1880 in erecting a greenhouse encroached, to the extent of a third of the area of the greenhouse, upon the plaintiff's land. The boundary

ESTOPPEL—*continued.*

of the two properties was not very clearly defined, and the solicitor was entirely ignorant of the encroachment. He might, however, have discovered it when he was investigating the title for the plaintiff, if he had measured the property. Early in 1898 the plaintiff discovered that part of the greenhouse was in fact situate on the land which he had purchased, but he said nothing to the solicitor about his discovery. The solicitor died in September, 1899, and in 1901 the plaintiff brought an action against his representatives to recover possession of that part of the site of the greenhouse which was comprised in his conveyance.

At the trial the plaintiff admitted that he was not induced to make the purchase by any representation by the solicitor as to the boundary of the property; that he knew before he entered into the contract that the greenhouse belonged to the solicitor; and that he did not suppose he was purchasing any part of the site of the greenhouse:—

Held, by Buckley J., that the solicitor must be taken to have represented to the plaintiff that he would have a good title to the whole of the land which he had purchased, and that the whole was effectually conveyed to him, and that the plaintiff, having paid his purchase-money on the faith of this representation, the solicitor was estopped, both by representation and breach of duty, from setting up as against the plaintiff his own title by adverse possession to a part of the land, and that the defendants were equally estopped:

Held, by the Court of Appeal, that as the plaintiff was not induced to purchase by any representation made by the solicitor, and did not suppose that he was purchasing any part of the greenhouse, and his position was in no way altered after he had entered into the contract for purchase, a representation (if any) by reason of the solicitor's negligence was not the proximate cause of loss to the plaintiff, and consequently that there was no estoppel. BELL *v.* MARSH **C. A. 528**

EXCHANGE—Easements—Settled land - 265
See SETTLED LAND. 2.

EXECUTION—Power of appointment—Domiciled foreigner—Unattested will - 898
See CONFLICT OF LAWS. 3.

EXECUTOR — *Charge of Debts and Legacies— Will—Power to sell Real Estate—Law of Property Amendment Act*, 1859 (*Lord St. Leonards' Act*, 22 *&* 23 *Vict. c.* 35), *ss.* 16, 18—*Devise to Person or Persons in Fee — Devise to Son on attaining Twenty-five—Power of Executor to grant Easement — Special Act — Construction — Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 7.

A testator appointed an executrix, charged his real estate with the payment of his debts and legacies, and devised his real estate in fee to his first son who should attain the age of twenty-five. Thirteen years after the testator's death his eldest son attained twenty-five:—

Held, that the devise to the son was not a devise to any person in fee or in tail within the

EXECUTOR—*continued.*
meaning of s. 18 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), that that section did not apply, and that under s. 16 the executrix had power to sell the real estate.

In re Wilson, (1886) 54 L. T. 600, applied.

In s. 7 of the Lands Clauses Consolidation Act, 1845, the expression "executors and administrators" is to be restricted to executors and administrators who are seised, possessed of, or entitled to land or any estate or interest therein.

Where, therefore, under a special Act persons empowered by the Lands Clauses Acts to sell and convey or release lands were empowered if they thought fit to grant easements:—

Held, that an executrix who had no estate or interest in land, but only a power to sell it, was not empowered to grant an easement over it. *In re* BARROW-IN-FURNESS CORPORATION AND RAWLINSON'S CONTRACT - **Kekewich J. 339**

—— Sale of leaseholds by—Lapse of time—Actual notice to purchaser that no debts of testator remain unpaid - - **65**
See VENDOR AND PURCHASER. 5.

EXPECTANCY—Voluntary settlement—Assignment—Power of trustees to call for transfer - - - - **697**
See SETTLEMENT. 3.

FACTORY—*Fire, Escape from—Two Factories in one House—Tenement Factory—Notice to construct Works — Separate Notices for each Factory — Owner's Right to enter on Occupier's Factory—Public Health—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 14, *sub-ss.* 2, 3, 7; *ss.* 87, 149.

The plaintiff owned a building the whole of which up to and including the fourth floor, but with the exception of the second floor, formed one factory, and was leased to and occupied by the defendants. The second floor was not a factory. The fifth, sixth, and seventh floors formed another factory. Each of these factories produced its own motive power. The county council gave notice to the plaintiff to provide better means of escape from fire; an arbitration took place at which the defendants were not present, and an award was made to the effect that an additional staircase ought to be made starting at the level of the third floor and extending to the seventh floor, and communicating with each of the intermediate floors. The county council served notice on the plaintiff requiring him to construct the works. The notices and the award treated the building as a whole, and did not deal with the factories as separate factories.

In an action brought by the plaintiff for an injunction to restrain the defendants from hindering him in making the staircase:—

Held, that the factories were separate factories, and that the whole building was not a tenement factory inasmuch as the occupiers produced their own power, and the building was therefore not one "where mechanical power is supplied" within s. 149 of the Factory and Workshop Act of 1901; that there was nothing in the Act which gave the plaintiff any right to enter on one of the factories in order to construct works

FACTORY—*continued.*
for the benefit of the other factory; the fact that the defendants were not present did not exempt them from being bound by the arbitration; but the notices and the award ought to have treated the factories as separate factories, and as this had not been done the proceedings were ineffectual, and the plaintiff was not entitled to enter upon the defendants' premises. TOLLER *v.* SPIERS & POND, LIMITED - **Buckley J. 362**

FELONY—*Administrator—Sale of Convict's Property—Bona Fides—Action by Convict against his Administrator — Costs — Forfeiture Act*, 1870 (33 & 34 *Vict. c.* 23), *ss.* 12, 17, 20, 29.

Under s. 12 of the Forfeiture Act, 1870, the administrator of a convict's property has absolute power to sell the whole or any part of that property as to him shall seem fit, and that power is not restricted by s. 17 to sales for the purposes of the Act—e.g., for the purposes of paying the convict's debts or the costs of his prosecution. The sale must be made bonâ fide, and that involves the exercise of care and judgment; but if made bonâ fide on the part of the administrator, it is binding on the convict irrespective of whatever money is wanted or not.

A sale of jewellery made without the special direction of the administrator, but in accordance with a general rule that all such property of small value belonging to convicts shall be forthwith sold, cannot be questioned if it has been made bonâ fide on the part of the administrator.

As a general rule the administrator will be entitled as a trustee to the costs of an action for an account brought against him by the convict after his sentence has expired, but the costs are in the discretion of the Court both under the general jurisdiction of the Court and also under s. 20 of the Forfeiture Act, 1870, if that section applies; but,

Semble, s. 20 adds nothing to the general rule in respect of the costs of an action brought by a convict against his administrator. CARR *v.* ANDERSON - - - - **Buckley J. 90**

FIDUCIARY RELATION — Solicitor and client—Competent independent advice **27**
See SOLICITOR. 3.

FINANCE ACT.
See under REVENUE.

FINES AND RECOVERIES — Estate tail — Whether barrable—Reversion in Crown
See CROWN. **865**

FIRE—Escape from—Two factories in one house—Notice to construct works - **362**
See FACTORY.

FIXTURES—Trade—Covenant—Construction—General words - - - **806**
See LANDLORD AND TENANT. 2.

FORECLOSURE.
See under MORTGAGE.

FOREIGNER—Conflict of laws.
See under CONFLICT OF LAWS.

FORFEITURE—Administrator—Sale of convict's property—Bona fides—Costs - **90**
See FELONY.

FORFEITURE—*continued.*

—— Assignment to trustees of marriage settlement—Dispose or attempt to dispose of *See* POWER OF APPOINTMENT. 2. 715

—— Name clause—Condition precedent or subsequent—Vesting - - - 749
See WILL. 12.

—— Shares—Rescission of forfeiture - 711
See COMPANY. 10.

FORGERY—Receipt—Priority—Equitable mortgage—Fraud—Possession of title-deeds *See* VENDOR AND PURCHASER. 3. 428

FRAUD—Priority—Equitable mortgage—Notice — Possession of title-deeds — Forged receipt - - - - - 428
See VENDOR AND PURCHASER. 3.

FRAUDS, STATUTE OF—Contract—Wrong date —Memorandum in writing—Consensus ad idem - - - - - 434
See VENDOR AND PURCHASER. 2.

GENERAL WORDS—Covenant—Construction—Trade fixtures - - - 806
See LANDLORD AND TENANT. 2.

GRANT — Light — Implied grant — Derogation from grant—Building agreement 659
See LIGHT AND AIR. 2.

HIGHWAY — *Ownership — Soil of Highway — Street in Town—New Street—Crown Lease — Presumption that Soil of Highway ad medium filum passes to adjoining Owner—Rebuttal of Presumption.*

The Commissioners of Woods and Forests acquired a tract of land under an Act of Parliament passed for the purpose of executing a scheme of street improvements in the metropolis. Under this Act they made Regent Street and leased the houses in the street as they were built, including a house now sub-demised to the plaintiff. The plaintiff claimed to be entitled to the soil of the moiety of the street next to his house for the residue of his interest therein by virtue of the presumption that the conveyance of a house adjoining a highway passes the soil of the highway usque ad medium filum. The head lease of the plaintiff's house described the property by dimensions and abuttals and by a map, and referred to it as abutting on a street then forming. Upon the construction of the Act it was doubtful whether the Commissioners had any power to lease the soil of the street:—

Held, that apart from any question as to the powers of the Commissioners, the presumption was rebutted by the surrounding circumstances, regard being had to the terms of the lease and the provisions of the Act. MAPPIN BROTHERS *v.* LIBERTY & Co. **Joyce J. 118**

HOTCHPOT—Advancements—Interest—Period of distribution - - - 889
See WILL. 3.

—— Authorized security — Loss — Period of account—Apportionment - - 942
See SETTLED LAND. 1.

HUSBAND AND WIFE—*Insurance—Policy of Insurance—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 11—*Policy "for Benefit of Wife and Children"—Death of Wife and subsequent Marriage of Assured.*

A man, who had a wife and children, effected a policy of insurance on his life under the Married Women's Property Act, 1882, s. 11. The policy was expressed to be "for the benefit of his wife and children." The wife died, and the man married again and had a child by his second wife. On his death:—

Held, that the widow and her child were entitled to participate jointly with the children of the first marriage. *In re* BROWNE'S POLICY. BROWNE *v.* BROWNE **Kekewich J. 188**

2. —— *Insurance — Policy of Assurance — Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Policy "for Benefit of his Wife, or if she be dead between his Children"—Death of Wife and subsequent Marriage of Assured—Children born before and after issue of Policy—Child of second Marriage.*

A man who had a wife and four children effected a policy of assurance on his life under the Married Women's Property Act, 1870. The policy was expressed to be "for the benefit of his wife, or if she be dead between his children in equal proportions." The wife died, having had four more children after the issue of the policy. The assured subsequently married again, and had one child by his second wife. On his death, leaving his widow and nine children him surviving:—

Held, that the widow was not entitled to participate in the policy moneys, but that they went to the children of the first and second marriages in equal shares.

In re Lyne's Trust, (1869) L. R. 8 Eq. 65, not followed. *In re* GRIFFITHS' POLICY **Joyce J. 739**

—— Marriage settlement.
See under SETTLEMENT.

ILLEGITIMATE CHILD—Will—Construction
See WILL. 9. 198

INCLOSURE, &c., OF LAND—Lands Clauses Act —Compensation for commonable rights —Apportionment - - - 507
See COMMON.

INFANT — Ademption — General legacy — Particular purpose - - - 259
See WILL. 2.

—— Illegitimate child—Will—Construction
See WILL. 9. 198

—— Trust — Administration — Compromise — Jurisdiction of Court to approve - 848
See TRUSTEE. 1.

INFRINGEMENT—Patent - - - 410
See PATENT. 2.

—— Trade-mark.
See under TRADE-MARK.

INJUNCTION — Club — Alteration of rules — Raising subscription — Expulsion of member - - - - 921
See CLUB.

INJUNCTION—*continued.*

—— Company—Reconstruction—Sale of undertaking—Consideration—Commission
See COMPANY. 9. 295

—— Mandatory—Clock fixed to outside of house — Breach of lessee's covenant — "Alteration" - - - 158
See LANDLORD AND TENANT. 1.

—— Streets—New street—Penalty recoverable by summary proceedings - - 101
See STREETS. 1.

INLAND REVENUE.
See under REVENUE.

INSTITUTE — Use for purposes not strictly charitable - - - - 232
See CHARITY. 2.

INSURANCE, LIFE—Married Women's Property Act—Policy "for benefit of wife and children" — Death of wife and subsequent marriage of assured - 188
See HUSBAND AND WIFE. 1.

—— Married Women's Property Act—Policy "for benefit of his wife, or if she be dead between his children" - 739
See HUSBAND AND WIFE. 2.

—— Sale of life policy—Death of assured before contract—Common mistake—Rescission after completion - - - 453
See CONTRACT. 2.

INTEREST —Advancements—Hotchpot—Period of distribution - - - 889
See WILL. 3.

—— Allowing interest on charge on land—Practice - - - - 781
See LIEN.

—— Arrears, Mortgagee's right to recover—Real Property Limitation - - 385
See MORTGAGE. 1.

INTERNATIONAL LAW.
See under CONFLICT OF LAWS.

INTESTACY—Entirety, Devise of—No words of limitation — Intestacy of devisee — Devolution - - - - 241
See ESTATE PUR AUTRE VIE.

INVESTMENTS—Authorized investment—Stock of municipal borough - - 446
See TRUSTEE. 2.

—— Unauthorized—Partly paid shares—Breach of trust - - - - 947
See TRUSTEE. 3.

—— Unauthorized, Change of—Emergency—Sanction of Court—Jurisdiction - 955
See TRUSTEE. 4.

JUDGMENT—Debenture-holder's action—Right of plaintiff to discontinue after judgment
See COMPANY. 1. 203

JUDICATURE ACT—Merger—Lease—Mortgage by underlease—Subsequent purchase by lessee of freehold reversion - 631
See MERGER.

JURISDICTION —Infants —Compromise —Jurisdiction of Court to approve - 848
See TRUSTEE. 1.

JURISDICTION—*continued.*

—— Investment, Unauthorized, Change of—Emergency—Sanction of Court - 955
See TRUSTEE. 4.

—— Lands Clauses Act — Compensation for commonable rights—Apportionment
See COMMON. 507

—— Patent—Leave to amend specification—Jurisdiction of comptroller - 18
See PATENT. 3.

—— Settlement—Contract in Scotch form—English trustees — Mortgage — Husband's life interest - - 933
See CONFLICT OF LAWS. 2.

—— Streets—New street—Penalty recoverable by summary proceedings - - 101
See STREETS. 1.

JUSTICES—Street—"New street," Laying out—Injunction—Attorney-General, Absence of - - - - - 759
See LOCAL GOVERNMENT.

LAND—Common Lands.
See under COMMON.

—— Mortmain and charitable use—Vesting in official trustee - - - 467
See CHARITY. 3.

LAND TRANSFER—Registered title to land—Unregistered deed—Registered charge
See MERGER. 631

LAND TRANSFER RULES, 1898, rr. 106, 107, 110 - - - - - 631
See MERGER.

LANDLORD AND TENANT—*Lease*—*"Alteration"—Breach of Lessee's Covenant—Mandatory Injunction—Covenant not to make any Alteration to Demised Premises without Consent of Lessor—Clock fixed to Outside of House.*

The lease of a shop occupied by a jeweller and watchmaker contained a covenant by the lessee that he would not make or suffer to be made any alteration to the demised premises without the previous written consent of the lessor:—

Held, that some limitation must be placed on the words of the covenant, and that the erection of a large clock, affixed without the consent of the lessor to the exterior of the wall of the house by means of bolts driven into it, was not a breach of the covenant, and consequently that a mandatory injunction to compel the removal of the clock ought not to be granted.

Decision of Farwell J. reversed.

Per Vaughan Williams and Cozens-Hardy L.JJ.: The word "alteration" in the covenant must be limited to alterations which would affect the form or structure of the building.

Per Stirling L.J.: There must be excepted from the covenant, not only things absolutely essential to the carrying on of the business, but also things fixed to the premises for the purpose of carrying on the business in a reasonable, ordinary, and proper way.

Per Cozens-Hardy L.J.: If, after entering into such a covenant, the covenantor, notwithstanding notice of objection by the covenantee, deliberately commits a breach of it, a mandatory

LANDLORD AND TENANT—*continued.*
injunction ought to be granted, provided that there has been no laches on the part of the covenantee. BICKMORE *v.* DIMMER - **C. A. 158**

2. —— *Lease — Covenant — Construction — Trade Fixtures — General Words — Ejusdem Generis.*

An underlease of premises to be used for the business of a boot and shoe manufacturer contained a covenant by the lessee to yield up the premises on the determination of the term, "together with all doors, locks, keys, bolts, bars, staples, hinges, iron pins, wainscots, hearths, stones, marble and other chimney-pieces, slabs, shutters, fastenings, partitions, pipes, pumps, sinks, gutters of lead, posts, pales, rails, dressers, shelves, and all other erections, buildings, improvements, fixtures and things which then were or which at any time during the said term should be fixed, fastened or belong to the said demised messuage and premises or any part thereof":—

Held, that the covenant, by reason of the general words contained therein, extended to the trade fixtures used in the lessee's business of a boot and shoe manufacturer.

Bidder v. *Trinidad Petroleum Co.*, (1868) 17 W. R. 153, followed. LAMBOURN *v.* MCLELLAN **Kekewich J. 806**

3. —— *Lease—Quiet Enjoyment, Covenant for—Breach—Assignee of Reversion—Purchase of adjoining Property after Date of Lease—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 11.

In 1897 a lease of offices for a term of fourteen years was granted to the plaintiff by the then owner of the freehold. The lease contained the ordinary covenant by the lessor, for himself, his executors, administrators and assigns, for the quiet enjoyment of the demised premises by the lessee. In 1898 the lessor conveyed the reversion, subject to the lease, to the defendants. In 1900 the defendants purchased from a stranger a house adjoining the demised premises, pulled it down, and erected on the site a new building of such a height that it caused one of the plaintiff's chimneys to smoke so as to affect materially his enjoyment of one room:—

Held, that the defendants were not liable for a breach of the covenant for quiet enjoyment, inasmuch as at the date of the demise the lessor had no interest in the adjoining premises, and could not and did not for the benefit of the lessee put any fetter on their enjoyment, but undertook to respect rights of the lessee which were limited by the fact that the owner of the adjoining land might, if he were so minded, build on it so as to interfere with the draught of the lessee's chimneys.

Decision of Byrne J., [1902] 2 Ch. 635, affirmed.

The ordinary covenant for quiet enjoyment does not enlarge the grant. So far as the covenant is personal or collateral it does not run with the land.

Per Romer and Cozens-Hardy L.JJ. Whether *Tebb* v. *Cave*, [1900] 1 Ch. 642, was rightly decided, *quære*.

Per Romer L.J. Whether an indirect interference with the enjoyment of demised land (not affecting the title or the possession) is a breach of the lessor's covenant for quiet enjoyment, *quære*.

Per Cozens-Hardy L.J. Sect. 11 of the Conveyancing Act, 1881, has in no way altered the old law as to the class of covenants the burden of which will run with the land. DAVIS *v.* TOWN PROPERTIES INVESTMENT CORPORATION, LIMITED - - - - **C. A. 797**

—— Lease—Merger—Mortgage by underlease—Subsequent purchase by lessee of freehold reversion - - - **631**
See MERGER.

—— Settled estates—Powers—Lease—Validity
See SETTLED LAND. 4. **836**

LANDS CLAUSES ACTS—Compensation for commonable rights—Apportionment - **507**
See COMMON.

—— Compensation for personal injury, inconvenience, or annoyance - **480**
See RAILWAY.

—— Easement, Power of executor to grant **339**
See EXECUTOR.

—— Payment out of court—Consent of Charity Commissioners - - - **208**
See CHARITY. 4.

LEASE.
See under LANDLORD AND TENANT.

LEASEHOLDS—Sale by executor—Lapse of time—Actual notice to purchaser that no debts of testator remain unpaid - **65**
See VENDOR AND PURCHASER. 5.

—— Title—Open contract—Breach of covenant to repair—Receipt for rent, Production of - - - - - **287**
See VENDOR AND PURCHASER. 4.

LEGACY.
See under WILL.

LIEN—*Equitable Charge on Land—Interest not mentioned in Charge—Enforcing Charge—Lapse of Time—Presumption of Satisfaction—Merger—Allowing Interest on Charge on Land—Practice—Real Property Limitation Act*, 1883 (3 & 4 *Will.* 4, *c.* 27), *s.* 40.

Where any settlement or contract contains a provision that a certain fixed sum of money is to be charged on land and to be paid at a fixed time, then, as between the owner of the land and the person entitled to the money, the money, in the eye of a Court of Equity, bears interest from the date fixed for payment of the money, although nothing is said as to interest in the settlement or contract—unless there are circumstances negativing the presumption that interest is payable.

In 1823 an order was made in a lunacy giving the lunatic's committee power to purchase on his behalf a freehold estate, and to pay the purchase-money out of the rents and profits of his real estate; and the order went on to declare that the rents and profits so to be applied "shall form a lien on the purchased estate in trust for the lunatic, his executors and administrators"; but the order was silent as to interest. The committees accordingly paid the purchase-money out of

LIEN—*continued.*
the rents and profits of the lunatic's real estate, and in 1824, in consideration of the purchase-money, a conveyance was executed to trustees for the lunatic. The conveyance contained a declaration of lien corresponding to the terms of the order, but again without mentioning interest.

In 1828 the lunatic died intestate, leaving a married sister his heiress-at-law and sole next of kin, who thereupon took out administration to his estate. In 1853 she died, when her husband, D., became tenant by the curtesy of the purchased property, and continued in enjoyment as such until his death in 1887. After his wife's death he had taken out administration to her estate, and also to the estate of the lunatic. No steps had ever been taken for raising the amount of the lien or charge, and no interest had ever been paid upon it.

In an action by D.'s legal personal representatives against the persons who had become entitled to the purchased estate to enforce the lien:—

Held, (1) that there had been no merger of the lien either at law or in equity, and nothing to justify a presumption of satisfaction through lapse of time; and (2) that, although interest was not mentioned either in the order in Lunacy or in the conveyance, the Court would, in accordance with its well-settled practice in other cases of equitable charges on land where interest is not mentioned (such as loans on deposit of title-deeds, portions and legacies charged on land), and having regard to the circumstances of the case, treat the lien as an interest-bearing debt—that is to say, as bearing interest at 4 per cent. as from the death of the lunatic; and that inasmuch as, in the events which had happened, such interest must be regarded as having been virtually paid down to D.'s death in 1887, the lien was not statute-barred at that date. As by arrangement between the parties the statute was treated as not running from D.'s death, interest was allowed as from that date.

Decision of Joyce J. affirmed. *In re* DRAX. SAVILE *v.* DRAX - - - **C. A. 781**

LIGHT AND AIR—*Ancient Lights—Easement—Enjoyment by "Consent or Agreement"—"Windows overlooking"—Skylight—Prescription Act*, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *s.* 3.

In 1873 the plaintiff erected upon his property adjoining that of the defendant a conservatory with a glazed roof sloping down to the vertical side of the conservatory, which side stood practically on the boundary line between the two properties. That vertical side was glazed, having sashes hung on hinges from the top, and made to open outwards over the defendant's property. The plaintiff at the time of the erection of his conservatory signed an agreement to pay 1*s.* a year "as an acknowledgment for allowing the windows in my conservatory adjoining to open on to and overlook" the defendant's property. The annual payments under the agreement were made down to 1888, when the conservatory was converted into a passage, the glazed side being bricked up, leaving the glazed roof as a skylight to the passage. In 1901 the defendant built a wall on his land along the boundary line, carrying it above

LIGHT AND AIR—*continued.*
the plaintiff's skylight so as to obstruct the access of light thereto. In an action to restrain the obstruction of the skylight as an ancient light:—

Held (by Joyce J. and by the Court of Appeal), that the skylight was a "window" overlooking the defendant's property within the terms of the agreement, and consequently that, the access of light having been enjoyed by consent or agreement in writing within *s.* 3 of the Prescription Act, 1832, the plaintiff's action failed. EASTON *v.* ISTED - - - - - **C. A. 405**

2. —— *Building Agreement — Lease to be granted on Completion of House—Light—Easement—Implied Grant—Derogation from Grant—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 6, *sub-s.* 2.

By a building agreement between the Ecclesiastical Commissioners and the defendant the right was given to him to enter upon a piece of land belonging to them for the purpose of erecting a number of houses upon it. As each house should be erected and completed to the satisfaction of the Commissioners they agreed to grant a lease of it to the defendant for nine-nine years. The lease was to be in a specified form, one of the clauses in which provided that the Commissioners should have power to erect on the land adjoining the demised land any buildings whatsoever, whether they should or should not affect or diminish the light enjoyed by the lessee. It was also provided by the agreement that nothing therein contained should be deemed to operate as an actual demise of the land to the defendant, or to create as between him and the Commissioners the relation of tenant and landlord.

On one of the plots the defendant erected a house (No. 28), and the Commissioners granted to him a lease of that house in the specified form. The defendant sold that house to the plaintiffs, and transferred the lease of it to them. He afterwards erected on an adjoining plot a house (No. 30) which when completed obstructed the access of light to some of the windows of the plaintiffs' house. They brought an action against the defendant claiming an injunction and damages:—

Held, that, at the time when the defendant transferred the lease of No. 28 to the plaintiffs, he had not under the building agreement such an interest in the adjoining plot (No. 30) as would enable him to make an express grant of an easement of light over it, and that consequently no such grant by him could be implied.

Decision of Kekewich J., [1902] W. N. 163, reversed.

The provision of *s.* 6, sub-*s.* 2, of the Conveyancing Act, 1881, that a conveyance of land with houses on it shall operate to convey with the land (inter alia) all lights appertaining to the land or enjoyed therewith, applies only to such lights as the grantor could grant by express words, and does not operate to convey an easement of light which he has no power to grant expressly. QUICKE *v.* CHAPMAN - - - **C. A. 659**

—— Electric lighting installation — Capital money - - - - **560**
See SETTLED LAND. 3.

LIGHT AND AIR—*continued.*
—— "Open space"—"Building" - - 109
See BURIAL. 1.

LIMITATION — Equitable — Real estate — Appointment upon trust for sale—Conversion - - - - - 356
See POWER OF APPOINTMENT. 1.

—— No words of limitation—Devise of entirety —Intestacy of devisee—Devolution 241
See ESTATE PUR AUTRE VIE.

LIMITATIONS, STATUTE OF—Interest—Arrears, Mortgagee's right to recover - 385
See MORTGAGE. 1.

LOCAL GOVERNMENT—*By-laws—Infringement —Erection of Houses abutting on Public Highway —"New Street," Laying out—Injunction—Public Body—Statutory Remedy—Justices, Proceedings before — Information, Proceeding by — Attorney-General, Absence of—Jurisdiction—Urban Authority.*

The defendants were the owners of a triangular piece of land within the plaintiffs' borough. Two sides of the triangle abutted upon public highways within the borough. The defendants, in pursuance of a building scheme, commenced erecting houses on their land fronting the highways. The plaintiffs alleged that the defendants were laying out the highways as "new streets" which did not comply with the requirements of the borough by-laws as to width, and they claimed, first, an injunction, and, secondly, a declaration that the plaintiffs were entitled to remove or pull down any work begun or done by the defendants in contravention of the by-laws. The by-laws, which were framed under the Public Health Act, 1875, prescribed a penalty for infringement, to be recovered by summary proceedings, and provided that the plaintiffs might, subject to any statutory provision in that behalf, remove, alter, or pull down any work begun or done in contravention of the by-laws:—

Held, affirming Joyce J., [1902] 2 Ch. 182, (1) that the facts were not sufficient to justify the inference that the defendants were laying out the highways as "new streets" within the meaning of the by-laws; and (2) that the action was not maintainable in the absence of the Attorney-General.

Attorney-General v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101, approved. DEVONPORT CORPORATION *v.* TOZER - - C. A. 759

—— Streets—New street—Penalty recoverable by summary proceedings - - 101
See STREETS. 1.

LONDON—Building—Leasehold house—Title—Open contract—Dangerous structure
See VENDOR AND PURCHASER. 4. 287

—— Open space—Owner's right to light—"Building"—Non-joinder of Attorney-General - - - - 109
See BURIAL.

—— Street in town—Soil of highway—Ownership—Crown—Lease—Rebuttal of presumption - - - - 118
See HIGHWAY.

LORD CHANCELLOR—Sitting alone in Court of Appeal—Court of Appeal, Decision binding on - - - - 385
See MORTGAGE. 1.

LORD OF THE MANOR.
See under MANOR.

LUNACY—Power of sale—Duration—Determination—Absolute vesting of estate - 129
See POWER OF SALE.

MANDATORY INJUNCTION — Clock fixed to outside of house — Breach of lessee's covenant—"Alteration" - - 158
See LANDLORD AND TENANT. 1.

MANOR—*Lord of the Manor—Steward—Solicitor —Custody of Court Rolls.*

Both the lord of a manor and the steward have a qualified right to the custody of the court rolls. The steward is entitled to keep them for the purpose of discharging the duties of his office; and there is no rule that the lord is entitled as of right, in the absence of misconduct, to call upon the steward to give them up to him.

The decision in *Rawes* v. *Rawes*, (1836) 7 Sim. 624; 5 L. J. (N.S.) (Ch.) 114; 40 R. R. 191, must be understood as addressed to a case where the steward had misconducted himself. *In re* JENNINGS, A SOLICITOR - Buckley J. 906

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MEMORANDUM OF ASSOCIATION—Company.
See under COMPANY.

MERGER — *Lease — Mortgage by Underlease — Subsequent Purchase by Lessee of Freehold Reversion—Contemporaneous Mortgage by Purchaser—Intention to preserve Term—Registered Title to Land—Legal Estate—Unregistered Deed—Registered Charge—Statutory Form—Addition—Grant of Legal Estate to Mortgagee—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 4—*Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *ss.* 22–28, 29, 32, 49, 93–96 — *Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 20—*Land Transfer Rules*, 1898, *rr.* 106, 107, 110.

The transfer of land by a registered disposition takes effect by virtue of an overriding power, not by virtue of any estate in the registered proprietor. After land has been placed upon the register the legal estate in it will pass by an unregistered deed, subject to the risk of the grantee having his title defeated by an exercise of the statutory power of disposition given to the registered proprietor; but the grantee can by an entry on the register protect himself against that risk.

There is nothing in the Land Transfer Acts to prevent the passing of the legal estate in land by an ordinary mortgage deed executed by the owner in fee, whether he is or is not registered as proprietor.

By virtue of rule 107 of the Land Transfer Rules, 1898, a charge upon registered land may, with the approval of the registrar, be registered with the addition to the statutory form of a

MERGER—*continued.*
conveyance of the legal estate in the land to the mortgagee, though he cannot insist upon such an addition being made.

In 1871 a lease was granted of a public-house for a term of ninety-nine years at a rent of 100*l.* per annum. The lease contained a proviso for re-entry on default for twenty-one days in payment of this rent. The lease was assigned to the defendant Rhodes.

In May, 1897, Rhodes, "as beneficial owner," demised the house by way of mortgage to Flower & Sons for the residue of the term, less the last day thereof. No rent was reserved by this deed, and Rhodes covenanted to indemnify Flower & Sons against the original rent. The deed contained provisions making Rhodes in effect a trustee of the last day of the term for the mortgagees or a purchaser from them.

By a deed dated July 27, 1899, the house was conveyed to Rhodes in fee at the price of 3650*l.*, "subject to, but with the benefit of," the lease. To enable him to complete the purchase he arranged to borrow 3000*l.* from the plaintiff bank on the security of the house; and on July 27, 1899, a mortgage to the bank was executed immediately after the conveyance to Rhodes, the 3000*l.* being paid by the bank directly to the vendors. The property had been described to the bank as "a freehold ground rent of 100*l.* a year" secured on the house. By the mortgage deed Rhodes conveyed to the bank by way of mortgage the hereditaments comprised in the documents specified in a schedule, as to such of them as were freehold in fee simple, and as to such of them as he was entitled to for any term of years for the residue of such term, except the last day thereof. The schedule comprised the conveyance of July 27 and the other title-deeds relating to the freehold and the counterpart of the lease of 1871, but no other document relating to any leasehold interest.

At this time registration of title to land under the Land Transfer Acts had been made compulsory on sale in the parish in which the house was situate.

On August 28, 1899, Rhodes applied for the registration of himself as proprietor of the house, with a possessory title.

On the same day he executed an instrument charging the house with the payment to the bank of the 3000*l.* and interest.

The charge was in the form No. 39 in the schedule to the Land Transfer Rules, 1898, but there was added to it a grant of the house to the bank in fee, subject to redemption. This charge was also taken in for registration, and on September 18, 1899, the registrar issued a certificate that Rhodes was registered as proprietor of the house with a possessory title, and another certificate that the bank were registered as proprietors of the charge.

In April, 1901, Rhodes executed a deed of arrangement with his creditors to which the bank were not parties. Flower & Sons took possession of the house, and the bank demanded payment of the rent of 100*l.* from them, as well as from the trustee of the deed of April, 1901, but it was not paid.

The bank then brought an action against

MERGER—*continued.*
Rhodes, Flower & Sons, and the trustee of the deed of arrangement, claiming to enforce their security by foreclosure or sale. They claimed also a declaration that the term had not merged in the fee, and that they were entitled to re-enter for non-payment of the rent:—

Held, that, having regard to all the circumstances, it could not have been the intention of the parties that the term should merge in the fee; that before the Judicature Act there would in equity have been no merger; and that, consequently, by virtue of s. 25, sub-s. 4, of the Judicature Act, 1873, there was now no merger at law; that the term was still in existence, and that the bank, if the legal estate in the fee was vested in them, were entitled to enter for default in payment of the rent:

Held, also, by Romer and Cozens-Hardy L.JJ. (Collins M.R. doubting, but not dissenting), that by virtue of the registered charge with the added words the legal estate in the fee had passed to the bank.

Decision of Kekewich J. reversed.

The equitable rule that merger depends upon intention applies to the merger of estates as well as to the merger of charges.

Chambers v. *Kingham*, (1878) 10 Ch. D. 743, and *Ingle* v. *Vaughan Jenkins*, [1900] 2 Ch. 368, approved.

Per Romer and Cozens-Hardy L.JJ.: The register of proprietors under the Land Transfer Acts is not material for the purpose of determining in whom the legal estate in land is vested. CAPITAL AND COUNTIES BANK, LIMITED *v.* RHODES - - - - C. A. 631

—— Lien—Presumption of satisfaction—Lapse of time—Interest - - - 781
See LIEN.

METROPOLIS.
See LONDON.

MORTGAGE—By underlease—Merger—Lease—Subsequent purchase by lessee of freehold reversion - - - 631
See MERGER.

MISDESCRIPTION — Will — Mistake — "Freehold"—Customary freeholds - 135
See WILL. 11.

MISREPRESENTATION—Prospectus—Damages—Right of action - - - 546
See COMPANY. 6.

MISTAKE—Will—Misdescription of gift—"Freehold"—Customary freeholds - 135
See WILL. 11.

MORTGAGE—*Interest—Arrears, Mortgagee's right to recover—Mortgagor and Mortgagee—Proceeds of Sale of Real and Personal Estate—Reversionary Interest, Mortgage of—Administration Action—Fund in Court—Payment out—Summons—Application by Mortgagor—Redemption—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 42—*Lord Chancellor sitting alone in Court of Appeal—Court of Appeal, Decision binding on.*

Where a mortgagor applies by summons as against the mortgagee, that a fund in court in an administration action, being the proceeds of sale of the mortgaged property (real and personal estate under a will), may be paid out to him, the

MORTGAGE—*continued.*

mortgagor, after payment thereout to the mortgagee of six years' interest only, in addition to the principal, he is in the same position as if he had brought an action for redemption, and therefore cannot recover the fund except upon the usual redemption terms of payment of principal together with the full arrears of interest, s. 42 of the Real Property Limitation Act, 1833, having no application to the case.

A testator, who died in 1862, by his will gave his real and personal estates to trustees upon trust to pay the income to his widow for life, and after her death to sell the same and stand possessed of the proceeds in trust for his children equally. In January, 1867, F., one of the children, conveyed his reversionary interest in his share under the will to A., subject to a proviso for redemption on repayment to A. of 500*l.*, with interest at 5 per cent. per annum, in July, 1867. The mortgage contained the usual mortgagor's covenants for payment of the principal, and also of interest at 5 per cent. per annum so long as the principal remained unpaid: and it was agreed that A., his heirs, &c., should, out of any real and personal estate which should be received by him and them under the mortgage, pay all moneys owing on the security and pay the surplus (if any) to F. The mortgage contained a power of sale, but there was no power of attorney enabling the mortgagee to sue or give receipts in the absence of the mortgagor.

In August, 1867, F. died intestate. In 1872 an action was brought for the administration of the testator's estate, and under orders made in the action his real and personal estates were sold, F.'s share of the proceeds being carried to his separate account in the action. In 1887 A. died, having by will appointed executors. The testator's widow died in 1900, and in 1901 F.'s administrator applied by summons, A.'s executors being respondents, for payment out to him of F.'s fund in court, after payment thereout to A.'s executors of the principal due on the mortgage, together with not more than six years' arrears of interest:—

Held (reversing Farwell J.), that, notwithstanding s. 42 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), A.'s executors were entitled to receive out of the fund their full arrears of interest before F.'s administrator received anything.

In re Slater's Trusts, (1879) 11 Ch. D. 227, overruled.

Whether the decision of a Lord Chancellor sitting alone in the Court of Appeal is binding on that Court, discussed. *In re* LLOYD. LLOYD *v.* LLOYD - - - - C. A. 385

2. —— *Power of Sale—Foreclosure Action—Order nisi for Foreclosure—Exercise of Power—Pursuit of all Remedies at once.*

A mortgagee cannot, after the usual order nisi for foreclosure and before the foreclosure is made absolute, exercise his power of sale without the leave of the Court. But the power is suspended only, not extinguished; and a bonâ fide purchaser without notice may get a good title under the power. STEVENS *v.* THEATRES, LIMITED Farwell J. 857

MORTGAGE—*continued.*

—— Company incorporated by statute—Power to charge surplus lands—Existing debt *See* CORPORATION. 169

—— Conflict of laws—Contract in Scotch form—English trustees—Alimentary provision *See* CONFLICT OF LAWS 2. 933

—— Lien—Merger—Lapse of time—Presumption of satisfaction—Interest - 781 *See* LIEN.

—— Priority—Equitable mortgage—Notice—Fraud of vendor's solicitor—Possession of title-deeds - - - 428 *See* VENDOR AND PURCHASER. 3.

MUNICIPAL BOROUGH—Stock of—Trustee—Authorized investment - - 446 *See* TRUSTEE. 2.

NAME CLAUSE—Will—Condition precedent or subsequent - - - - 749 *See* WILL. 12.

NEPHEWS—Class—"My own nephews and nieces"—Half-blood - - 138 *See* WILL. 6.

NIECES—Class—"My own nephews and nieces"—Half-blood - - - 138 *See* WILL. 6.

NOTICE—Motion for attachment—Service of order—Four-day order - - 87 *See* ATTACHMENT.

—— Priority—Equitable mortgage—Fraud—Possession of title-deeds—Forged receipt - - - - - 428 *See* VENDOR AND PURCHASER. 3.

—— Priority—Reversionary trust fund—Notice to one of several trustees—Death of trustee who had notice - - 183 *See* ASSIGNMENT.

—— Sale of leaseholds by executor—Actual notice to purchaser that no debts of testator remain unpaid - - 65 *See* VENDOR AND PURCHASER. 5.

OCCUPATION RENT—Land in occupation of vendor - - - - 509 *See* VENDOR AND PURCHASER. 1.

OPEN SPACE—Owner's right to light—"Building"—Non-joinder of Attorney-General *See* BURIAL. 109

OWNERSHIP—Soil of highway—Street in town—Crown—Lease—Rebuttal of presumption - - - - - 113 *See* HIGHWAY.

PARENT AND CHILD—Double portions—"Advances"—Satisfaction—Ademption *See* WILL. 13. 267

—— Satisfaction—Double portions - 1 *See* WILL. 4.

PARTNERSHIP—*Assignment of Share—Payment of Salaries to Partners—Right of Assignee to interfere—Partnership Act*, 1890 (53 & 54 *Vict.* c. 39), *ss.* 24, 31.

Three partners were carrying on business

PARTNERSHIP—*continued.*

under the terms of a deed which provided that they should be entitled to the profits in equal shares, but contained no affirmative clause defining the duties of the partners, nor any provision for the payment of a salary to any partner. By a settlement made in 1889 one of the partners charged his share in the undertaking with payment to trustees of 10,000*l.* and interest, and also covenanted to pay to them all the rest of his share of the profits after making certain payments. Subsequently to the date of this settlement the partners came to an agreement under which, in consideration of their doing more work for the business, they received salaries. It was proved that this was done bonâ fide, and that the partners did work for their salaries:—

Held, that payment of the salaries was part of the "management or administration" of the business within s. 31 of the Partnership Act, 1890, and was binding on the assignees under the settlement. *In re* GARWOOD'S TRUSTS. GARWOOD *v.* PAYNTER - - - **Buckley J. 236**

—— Lease to donee of power and his partners—Settled estates—Statutory requirements *See* SETTLED LAND. 4. **836**

PATENT—*Costs of Appeal—Taxation—Counsel's View after Trial for Purposes of Appeal—Further Evidence on Appeal—Costs of Witness attending but not called—Rules of Supreme Court*, 1883, *Order* LVIII., *r.* 4; *Order* LXV., *r.* 27, *sub-r.* 29.

There is no difference in principle between the costs of counsel's view before trial and the costs of counsel's view after trial for the purposes of an appeal; and although such costs will not as a general rule be allowed in party and party taxation, yet the Court will not interfere with the decision of the taxing master where, in the exercise of his discretion, he has allowed them.

An appellant gave notice of motion to adduce further evidence on the appeal on two points. At the hearing of the appeal he obtained leave and gave further evidence on the first point, and his witness was not cross-examined. Thereupon it became unnecessary to give further evidence on the second point, and he made no application in respect thereof. The appeal was allowed with costs:—

Held, that the taxing master had no jurisdiction to allow the appellant the costs of a witness who had attended the Court of Appeal to give evidence on the second point, if called.

Quære, whether, if leave to adduce evidence on the second point had been obtained, the costs of a witness attending for that purpose, but not called, could be allowed. LEEDS FORGE COMPANY *v.* DEIGHTON'S PATENT FLUE AND TUBE COMPANY - - - - **Farwell J. 475**

2. —— *Infringement—Claim on several Patents—Separate Causes of Action, Combining in one Action—Particulars of Objections—Defence—Embarrassing Defendant—Limitation of Claim—Procedure—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-s.* 2—*Rules of the Supreme Court*, 1883, *Order* XVIII., *rr.* 1, 8, 9; *Order* XIX., *r.* 27—*Appeal—Further Evidence, Admissibility of—Consent Order.*

In a patent action for infringement, as in every other kind of action, the onus is on the plaintiff to prove that he has a definite cause of action against the defendant, and he is not entitled to call upon the defendant to disprove the alleged infringement—in other words, to prove that the plaintiff has no cause of action against him. And this is so even where the plaintiff may be suing upon several patents in one action upon the ground that it is impossible for him, unless the defendant discloses the process of manufacture of the infringing article, to state definitely which of the patents in particular have or has been infringed.

The plaintiffs, the owners of twenty-three patents for "Saccharin," sued the defendant, a trader who had purchased and imported from foreign manufacturers an article called "Sucramine," for alleged infringement, all twenty-three patents being united in one action. In their particulars the plaintiffs stated generally that the defendant had infringed "all" the patents, but alleged only two specific cases of infringement. To enable him to prepare and deliver his defence with particulars of objections as required by s. 29, sub-s. 2, of the Patents, Designs, and Trade Marks Act, 1883, the defendant, who said he did not know the process of manufacture of sucramine, applied to Kekewich J. by summons that the plaintiffs might be ordered to give further and better particulars of breaches, specifying which of the twenty-three patents they relied on as having been infringed, or that, under Rules of the Supreme Court, 1883, Order XVIII., rr. 1, 8, 9, and Order XIX., r. 27, the trial of the action might be limited to such of the twenty-three patents, as being separate causes of action, as to the Court might seem just. The evidence on the summons shewed that the patents were capable of division into three separate groups, so that the infringements specifically charged, if infringements of one group, could not be infringements of the others; but the plaintiff professed his inability to say which of the groups had been infringed. Kekewich J. ordered the summons to stand over until after the defence had been delivered:—

Held, on appeal, that the plaintiffs were not entitled to unite the twenty-three patents in one action, but must be limited to selecting a certain number of them, not exceeding three in the first instance, upon which they would proceed with their action.

Saccharin Corporation, Limited v. *Quincey*, [1900] 2 Ch. 246; 17 Rep. Pat. Cas. 337, and *Saccharin Corporation, Limited* v. *Dawson*, (1902) 19 Rep. Pat. Cas. 169, distinguished.

In a patent action, further evidence by affidavit and cross-examination of the defendant as to when and where he obtained the alleged infringing article is not admissible upon an appeal except under special circumstances, or by the consent of the parties. SACCHARIN CORPORATION, LIMITED *v.* WILD - - **C. A. 410**

3. —— *Practice—Leave to Amend Specification—Jurisdiction of Comptroller—Petition for Revocation presented after Application for Leave to Amend but before Decision thereon—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 18, *sub-s.* 10; *s.* 19—*Patents*

PATENT—*continued.*

Designs, and Trade Marks Act, 1888 (51 & 52 *Vict. c.* 50), *s.* 5.

An application for leave to amend the specification of a patent having been made to the comptroller under s. 18 of the Patents, &c., Act, 1883:—

Held, that the subsequent presentation of a petition for revocation of the patent, before the comptroller had given his decision, did not, by virtue of sub-s. 10 of s. 18, operate to suspend his jurisdiction, but that he could, notwithstanding the pendency of the petition, grant leave to amend.

Decision of Kekewich J., W. N. (1902) 137, affirmed. WOOLFE *v.* AUTOMATIC PICTURE GALLERY, LIMITED - - - - **C. A. 18**

PAYMENT OUT OF COURT—Consent of Charity Commissioners - - - **208**
See CHARITY. 4.

PENALTY—Recoverable by summary proceedings—New street—Injunction—Jurisdiction - - - - **101**
See STREETS. 1.

PERPETUITY—*Remoteness—Equitable Contingent Remainders—Child en ventre sa mère—Relation back.*

The rule of law as to remoteness—which allows absolute ownership to be suspended for a life or lives in being and twenty-one years afterwards, and treats a child en ventre sa mère as a life in being—is not infringed by the fact that when the instrument limiting the estate comes into operation (in the case of a will the devisor's death) the first life tenant is en ventre sa mère; but on his subsequent birth alive the law applies the doctrine of relation back, and treats the child as having been born alive at the time when the instrument came into operation, whether the application of the doctrine is for the benefit of the child, or immaterial to him, or to his actual disadvantage.

The doctrine of *Doe* v. *Lancashire*, (1792) 5 T. R. 49; 2 R. R. 535, applied.

A testatrix devised real estate to trustees upon trust to pay the income to M. during her life, and after her death to stand possessed of the real estate upon trust for the second and every younger son of M., born or to be born, successively, with remainder, after the death of each such son, upon trust for his first and other sons successively in tail male.

The testatrix died in October, 1880, at which date M. had had (*a*) a son, who died in 1877, (*b*) a son who was disqualified by the will from taking under the limitations, and she was pregnant of (*c*) a third son, S., who was born in February, 1881:—

Held, that the limitations did not transgress the rule against remoteness, that the sons of S. took valid estates in tail male in remainder, and that it was immaterial that it was disadvantageous to S. to apply the doctrine of relation back of his birth to the date of the death of the testatrix, and thus prevent him from taking a larger estate than an estate for life. *In re* WILMER'S TRUSTS. MOORE *v.* WINGFIELD
Buckley J. 874

PETITION—Winding-up of company.
See under COMPANY.

POLICY.
See under INSURANCE, LIFE.

PORTIONS—Double—Parent and child—"Advances"—Satisfaction—Ademption **267**
See WILL. 13.

—— Legacy—Satisfaction—Parent and child—Double portions - - - **1**
See WILL. 4.

POSSESSION—Absolute gift—Actual possession—Intention - - - - **149**
See WILL. 1.

—— Substitutional gift—Death "before becoming entitled" to a share—Entitled in "possession" or in "interest" - **451**
See WILL. 17.

POWER OF APPOINTMENT—*Real Estate—Equitable Limitations—Appointment upon Trust for Sale—Conversion.*

The rule laid down in *Kenworthy* v. *Bate*, (1802) 6 Ves. 793; 6 R. R. 46, that a power to appoint land is well exercised by an appointment to trustees upon trust for sale, applied to a case where the limitations were equitable and trustees were directed to convey the property to such child or children, and "for such estate or estates, manner and form" as the donee of the power should appoint. *In re* REDGATE. MARSH *v.* REDGATE - - - - **Buckley J. 356**

2. —— *Successive Appointments—Cumulative or Substitutionary—Election—Intention—Life Interest—Forfeiture Clause—Dispose or attempt to dispose of—Assignment to Trustees of Marriage Settlement.*

Sir Thomas and Lady Tancred, acting under a power contained in a settlement to appoint in favour of children (other than an eldest son), appointed one-seventh of a sum of 7000*l.* to each of two of their daughters. At the dates of those appointments there were living seven children besides an eldest son. After the death of Sir T. T., and when there were living only six children (besides an eldest son), of which six the two said daughters were two, Lady T. by two deeds-poll appointed the whole fund equally to all her children other than the eldest son in sixths:—

Held, that no question of election arose; that the question depended upon the true construction of the deeds of appointment; and that the two daughters who had each received one-seventh could not also take one-sixth, inasmuch as it was the intention of Lady T., as shewn by the last appointments, that the whole fund should go in sixths.

England v. *Lavers*, (1866) L. R. 3 Eq. 63, explained and followed.

A person entitled to a life interest, determinable if he should dispose or attempt to dispose of it, assigned it to the trustees of his marriage settlement upon trusts under which he was to receive the income for life. By the settlement he appointed the trustees his attorneys to receive the income, and gave them power to pay the expenses of managing the trusts:—

Held, that this was not a disposition or

POWER OF APPOINTMENT—*continued.*
attempted disposition of his life interest so as to cause it to be forfeited.
Observations upon *In re Porter*, [1892] 3 Ch. 481. *In re* TANCRED'S SETTLEMENT. SOMERVILLE *v.* TANCRED. *In re* SELBY. CHURCH *v.* TANCRED **Buckley J. 715**
—— Assignment by appointee of his share in trust funds—Subsequent acquisition of interest by trustees of settlement **928**
See SETTLEMENT. 1.
—— Estate duty—Incidence—Direction to pay testamentary expenses - - **250**
See WILL. 8.
—— Execution — Domiciled foreigner — Unattested will - - - - **898**
See CONFLICT OF LAWS. 3.

POWER OF SALE—*Duration—Determination—Absolute Vesting of Estate—Incapacity of Person entitled.*
The question of the duration of a power in a settlement is, if the rule against perpetuities is not infringed, one of intention. A power of sale given by a will to trustees to enable them to perform a trust for the maintenance, out of capital as well as income, of a lunatic during his life, is not determined by the lunatic's becoming absolutely entitled to the property so long as he is unable to call for a conveyance. *In re* JUMP. GALLOWAY *v.* HOPE - **Swinfen Eady J. 129**
—— Foreclosure, Order nisi for—Exercise of power—Pursuit of all remedies at once
See MORTGAGE. 2. **857**

PRACTICE — *Costs — Taxation — Summons for Directions—Application for further Directions—Rules of Supreme Court,* 1883, *Order* XXX., *r.* 5; *App. N, Item* 51.
The proper fees to be allowed on an ordinary application for further directions subsequent to a summons for directions are 1*s.* 6*d.* for the notice of application, 1*s.* for the copy for chambers, and 2*s.* 6*d.* for the copy and service on the other side, making a total of 5*s.*
The notice fee is covered by the Rules of the Supreme Court, 1883, App. N, item 51, which allows 1*s.* 6*d.* "for preparing any necessary or proper notice, not otherwise provided for," although Order XXX., r. 5, under which these applications are now made by a notice instead of a summons, was not in force when Appendix N was prepared. MACGUARE *v.* MILLIGAN **Swinfen Eady J. 145**
2. —— *Discovery of Documents—Rules of Supreme Court,* 1883, *Order* XXXI., *rr.* 14–18, 26—*Several Defendants—Affidavit of Documents made on Application of one Defendant—Inspection by Co-defendant—Form of Order.*
In an action against several defendants, where the plaintiff has made an affidavit of documents on the application of one defendant who has paid the usual deposit, it is competent to the Court to make an order on the application of another defendant that the plaintiff do produce for his inspection the documents referred to in the affidavit, and if there is no evasion of the provision of Order XXXI., r. 26, as to deposit, such an order will be made, but with liberty to the plaintiff to withhold or seal up documents not relating to

PRACTICE—*continued.*
the matters in question between the plaintiff and the last-mentioned defendant.
Moore v. *Peachey*, [1891] 2 Q. B. 707, considered. PARDY'S MOZAMBIQUE SYNDICATE, LIMITED *v.* ALEXANDER - - **Kekewich J. 191**
—— Attachment—Notice of motion for—Service of order—Four-day order - - **87**
See ATTACHMENT.
—— Costs — Administrator — Sale of convict's property—Bona fides - - **90**
See FELONY.
—— Discontinuance—Debenture-holder's action—Right of plaintiff to discontinue after judgment - - - - **203**
See COMPANY. 1.
—— Non-joinder of Attorney-General—Owner's right to light—Open space - **109**
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—— Payment out of court—Consent of Charity Commissioners - - - **208**
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—— Separate causes of action, combining in one action - - - - **410**
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PRESCRIPTION — Ancient lights — Enjoyment by "consent or agreement"—Windows overlooking—Skylight - - **405**
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PRESUMPTION—Rebuttal of—Soil of highway—Ownership—Street in town—Crown—Lease - - - - **118**
See HIGHWAY.
—— Satisfaction—Lien—Merger—Lapse of time—Interest - - - - **781**
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PRIORITY—Equitable mortgage—Notice—Fraud of vendor's solicitor—Possession of title-deeds—Forged receipt - - **428**
See VENDOR AND PURCHASER. 3.
—— Reversionary trust fund—Notice to one of several trustees—Death of trustee who had notice - - - - **183**
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PRIVATE INTERNATIONAL LAW.
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PROMOTER—"Fraudulent" prospectus—"Material" contract—Damages - **586**
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PROSPECTUS—Directors' liability **546, 586, 766**
See COMPANY. 6—8.

PUBLIC HEALTH — Fire, Escape from — Two factories in one house—Notice to construct works - - - **362**
See FACTORY.
—— New street—Penalty recoverable by summary proceedings - - - **101**
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PUBLISHER — Encyclopædia — Ownership of copyright in contributions - 318
See COPYRIGHT.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

QUIET ENJOYMENT—Covenant for—Breach—Assignee of reversion - - 797
See LANDLORD AND TENANT. 3.

RAILWAY—*Land compulsorily taken—Limited Owner—Compensation for Personal Injury, Inconvenience, or Annoyance—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 73.
Part of the purchase-money of land taken by a railway company may be allotted to a limited owner as compensation for personal injury, inconvenience, or annoyance upon evidence that this compensation had been allowed for in fixing the price, though no particular sum had been apportioned for that purpose when the price was fixed. *In re* SAUNDERTON GLEBE LANDS. *Ex parte* THE RECTOR OF SAUNDERTON - Farwell J. 480

REAL ESTATE — Equitable limitations — Appointment upon trust for sale—Conversion - - - - - 356
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REAL PROPERTY LIMITATION — Interest — Arrears, Mortgagee's right to recover
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RECEIPT—Forged—Priority—Equitable mortgage — Notice — Fraud — Possession of title-deeds - - - - 428
See VENDOR AND PURCHASER. 3.

—— Production of, for rent—Breach of covenant to repair—Title—Open contract - 287
See VENDOR AND PURCHASER. 4.

REGISTRATION—Debentures—Extending time —Winding-up before date of registration
See COMPANY. 2. 914

—— Debentures, Series of — Covering deed — Subsequent issue—Registration - 498
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—— Land transfer.
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REMAINDERMAN—Tenant for life and.
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RESCISSION — Sale of life policy — Death of assured before contract—Common mistake—Rescission after completion 453
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RESIDUE—Estate duty—Incidence—Direction to pay testamentary expenses - 250
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—— Realty—Trusts pointing to personalty 483
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RESULTING TRUST—Realty—Trusts pointing to personalty - - - 483
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REVENUE—Estate duty—Incidence—Direction to pay testamentary expenses - 250
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—— Estate duty — Succession duty — Gift of annuities "without any deduction except legacy duty" - - - 685
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REVERSION—Notice to one of several trustees —Death of trustee who had notice—Priority - - - - 183
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SALARY — Assignment of share — Payment of salaries to partners—Right of assignee to interfere - - - - 236
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—— Executor—Power to sell real estate—Charge of debts and legacies - - 339
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SATISFACTION—Double portions—Parent and child—"Advances"—Ademption 267
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—— Parent and child—Double portions - 1
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—— Presumption of satisfaction—Lien—Merger—Lapse of time—Interest - 781
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SET-OFF — Company— Winding-up — Contributory—Call - - - - 70
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SETTING ASIDE—Deed—Form of order—Solicitor and client—Fiduciary relation 27
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SETTLED LAND — *Apportionment — Authorized Security—Loss—Period of Account—Tenant for Life and Remainderman—Hotchpot.*

Where an authorized security becomes insufficient and there is a partial loss of capital and income, the account necessary to apportion the amount realized between life tenant and remainderman must be taken from the date when it was first ascertained that the security was insufficient up to the date of realization, the life tenant bringing all income received during that period into hotchpot. *In re* PHILLIMORE. PHILLIMORE *v.* HERBERT - - **Swinfen Eady J. 942**

2. —— *Easements, Exchange of—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 5.

The Settled Land Act, 1890, s. 5, authorizes an exchange of easements, apart from any exchange or partition of land. *In re* BRACKEN'S SETTLEMENT - - **Swinfen Eady J. 265**

3. —— *Electric Lighting Installation—Engine-house—Tenant for Life and Remainderman—Capital Money—Additions and Alterations with a view to Letting—Settled Land Acts*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25; 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s. ii.*

The word "additions" in s. 13, sub-s. ii., of the Settled Land Act, 1890, means structural additions; and, therefore, an electric lighting installation for the improvement of the mansion-

SETTLED LAND—*continued.*

house is not an "addition" to buildings within the meaning of that sub-section.

In re Clarke's Settlement, [1902] 2 Ch. 327, and in *In re Gaskell's Settled Estates*, [1894] 1 Ch. 485, approved.

Semble, per Romer and Cozens-Hardy L.JJ. An engine-house for electric lighting apparatus, erected some little distance from the mansion-house, is not an "addition" or "alteration" within the meaning of this sub-section. *In re* BLAGRAVE'S SETTLED ESTATES - **C. A. 560**

4. —— *Lease—Validity—Lease to Donee of Power and his Partners—Statutary Requirements—Powers—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38) — *Covenants — Lease to Trustee for Donee of Power.*

A lease granted, in exercise of statutory powers to lease, by a tenant for life to himself and others as lessees containing covenants by the lessees with the lessor is bad, whether the covenants are joint only or joint and several, because the reversioners do not in either case obtain binding legal covenants by all the lessees upon which an action can be brought. Only binding legal covenants will satisfy the requirements of the statutes.

Semble, a lease granted by the donee of a power to a trustee for himself would not now be held valid.

Bevan v. *Habgood*, (1860) 1 J. & H. 222, discussed and questioned. BOYCE *v.* EDBROOKE **Farwell J. 836**

5. —— *Sale—Life Estate—Partial Merger—Continuance of Powers—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 50.

Although a life tenant of real estate has assigned a share of his life estate to a remainderman, so as to merge that share, he can still make a title to the entire settled estate with the consent of his assignee.

Observations of Chitty L.J. in *In re Mundy and Roper's Contract*, [1899] 1 Ch. 275, 296, considered. *In re* BARLOW'S CONTRACT **Swinfen Eady J. 382**

6. —— *Trustees — Compound Settlement — Trustees of Compound Settlement—Power of Appointing—Appointment of Trustees—Solicitor of Tenant for Life—Existing Trustees—Affidavit of Fitness—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 8; *s.* 38.

In 1863 estates were settled upon A. for life, with remainder, subject to a jointure and portions for younger children, to A.'s first and other sons in tail. In 1898 B., the eldest son of A., joined with his father in barring the entail and resettling the estates upon A. for life, with remainder to B. for life, with remainders over. The resettlement contained a declaration that the trustees of that deed should also be the trustees for the purposes of the Settled Land Acts of the compound settlement created by the settlement of 1863 and the resettlement of 1898. A. died in 1901. The jointure and portions charge was still subsisting. B. was desirous of selling part of the estates under his statutory power free from the jointure and portions charge, and now applied that the trustees of the resettlement might be appointed

SETTLED LAND—*continued.*
trustees of the compound settlement if the Court should be of opinion that they were not already properly appointed. One of these three trustees was the solicitor of the tenant for life, and also a trustee of the settlement of 1863:—

Held, that the declaration in the resettlement of 1898 did not amount to a declaration by "the settlement," as defined by s. 2, sub-s. 1, of the persons to be trustees thereof for the purposes of the Settled Land Acts within the meaning of s. 2, sub-s. 8, and consequently that there was no valid appointment of trustees of the compound settlement, who in this case could only be appointed by the Court:

Held, also, that the fact that the solicitor of the tenant for life was already a trustee of the settlement of 1863 and of the resettlement of 1898, and the alleged convenience to the parties of having the same trustees for all the settlements, was not sufficient to take the case out of the general rule laid down in *In re Kemp's Settled Estates*, (1883) 24 Ch. D. 485, and *In re Earl of Stamford*. [1896] 1 Ch. 288, and the two remaining trustees only were therefore appointed trustees of the compound settlement upon production of affidavits of their fitness in the usual way. *In re* HAMMOND SPENCER'S SETTLED ESTATES
Byrne J. 75

—— Sale—Consent of tenant for life—"Land"—Mortmain and charitable uses - **467**
See CHARITY.

SETTLEMENT—*Appointment—Special Power of Appointment—Appointment of Trust Funds for the time being subject to the Trusts of the Settlement—Assignment by Appointee of his Share in the Trust Funds and all other (if any) his Estate and Interest of and in all other the Trust Funds for the time being subject to the Trusts of the Settlement — Subsequent Acquisition of Interest by Trustees of Settlement—Marriage Settlement.*

By marriage articles dated in 1845 certain funds were settled upon trust for the husband, Sir R. W., for life, then for the wife, Lady W., for life, then for the children of the marriage as the husband should appoint, or in default of appointment by the husband as the wife should appoint. In 1876 Sir R. W. died without having exercised his power of appointment except as to a specific portion of the funds appointed in trust for a daughter. In 1879 Lady W. appointed that after her decease the trustees should stand possessed of the trust funds for the time being subject to the trusts of the articles (other than the sum appointed by Sir R. W.) in trust for the remaining six children of the marriage in equal shares. In 1893 one of the sons, William, by his marriage settlement assigned to trustees his one-sixth share of the trust funds (which he specified in a schedule) to which he was entitled on the death of his mother, and all other (if any) his estate and interest of and in all other the trust funds for the time being, subject to the trusts of the articles of 1845. By a codicil dated in 1878 Mrs. B. directed that the property which she had left by her will to Sir R. W. should be transferred to the trustees of the marriage articles and be held upon the trusts thereof, and she died in 1900. Subsequently, in 1900, Lady

SETTLEMENT—*continued.*
W. appointed this property in trust for certain of her children (including William):—

Held, first, that the appointment of 1879 did not operate as an appointment of any moneys not then subject to the trusts of the marriage articles; secondly, that William's marriage settlement passed only such estate as he then had in the trust funds; and, therefore, that his share of the property bequeathed by Mrs. B.'s codicil was not included in that settlement.

Semble. The effect of Mrs. B.'s bequest was not to make the property an accretion to the funds originally settled by the marriage articles, but to create a new referential settlement of such property upon similar trusts. *In re* WALPOLE'S MARRIAGE SETTLEMENT. THOMSON *v.* WALPOLE
Joyce J. 928

2. —— *Die "without ever having been married" — Children — Settlement — Construction — Ultimate Trust — Wife's Next of Kin—Weekly Notes—Citation.*

Where a settlement made on the marriage of a spinster contains trusts for her children attaining twenty-one or marrying, an ultimate trust, in default of such children, and in the event of the wife predeceasing the husband, for her statutory next of kin as if she had died intestate and "without ever having been married" primâ facie excludes children.

Clarke v. *Colls*, (1861) 9 H. L. C. 601, 612, followed.

No general rule to the contrary is laid down in *Wilson* v. *Atkinson*, (1864) 4 D. J. & S. 455.

Emmins v. *Bradford*, (1880) 13 Ch. D. 493, followed; *In re Ball's Trust*, (1879) 11 Ch. D. 270, *Upton* v. *Brown*, (1879) 12 Ch. D. 872, *Re Watson's Trusts*, (1886) 55 L. T. 316, *Stoddart* v. *Saville*, [1894] 1 Ch. 480, and *In re Mare*, [1902] 2 Ch. 112, not followed on this point.

Except on points of practice, the *Weekly Notes* should only be cited as interim reports of cases during the period required for their publication in the *Law Reports*. *In re* SMITH'S SETTLEMENT. WILKINS *v.* SMITH - **Swinfen Eady J. 373**

3. —— *Voluntary Settlement — Assignment — Expectancy — Receipt of the Property by the Settlor—Power of Trustees to call for Transfer.*

The decision in *Meek* v. *Kettlewell*, (1842) 1 Hare, 464; (1843) 1 Ph. 342; 58 R. R. 137, that the voluntary assignment of an expectancy, even though under seal, will not be enforced by a Court of Equity, has not been overruled by *Kekewich* v. *Manning*, (1851) 1 D. M. & G. 176. *In re* ELLENBOROUGH. TOWRY LAW *v.* BURNE
Buckley J. 697

—— Compound settlement — Appointment of trustees - - - - **75**
See SETTLED LAND. 6.

—— Conflict of laws—Contract in Scotch form—English trustees—Alimentary provision
See CONFLICT OF LAWS. 2. **933**

—— Voluntary settlement—Solicitor and client—Fiduciary relation—Undue influence
See SOLICITOR. 3. **27**

SHAREHOLDERS AND SHARES.
See Cases under COMPANY.

SKYLIGHT — Ancient lights — Enjoyment by "consent or agreement" — "Windows overlooking"—Prescription - 405
See LIGHT AND AIR. 1.

SOLICITOR—*Compromise—Solicitor and Client—Writ issued in District Registry—Country Agent Solicitor on Record for London Principal—Scope of Country Agent's Authority — London Agent's Authority — Compromise — Lay Client bound — Rules of Supreme Court*, 1883, *Order IV., rr.* 1, 3; *Order XII., r.* 10.

The solicitor on the record—whether in London as agent for a country solicitor or in a district registry as agent for a London solicitor—has a general authority to compromise an action on behalf of his client, provided he acts bonâ fide and reasonably, and not in defiance of his direct and positive instructions; and in either case the lay client will be bound although there is no privity between him and the agent on the record.

The principle of *Prestwich* v. *Poley*, (1865) 18 C. B. (N.S.) 806; and the dicta in *Withers* v. *Parker*, (1859) 28 L. J. (Ex.) 292; on appeal, (1860) 29 L. J. (Ex.) 320—that there is no distinction between the act of the London agent and the act of the country solicitor—approved and applied.

Trustees issued an originating summons in the Liverpool District Registry for directions in certain matters relating to the trust estate. An appearance was entered in the district registry by Liverpool solicitors as agents for London solicitors, who were the principal solicitors of the defendants, the beneficiaries under the trust. The defendants objected to the application as unnecessary, and on their behalf a summons was taken out to transfer the proceedings to London. Prior to the hearing of the two summonses the London solicitors wrote their Liverpool agents, "Failing an order dismissing the plaintiffs' application with costs, and giving costs on our application, you will please adjourn the matter to the judge." When the two summonses were heard by the registrar, the Liverpool agents, after some discussion, agreed that no order should be made except that the costs of all parties should be paid out of the estate. On motion by the defendants to discharge this order:—

Held, on the evidence, that it was a consent order; that the letter did not prohibit a compromise; and that the defendants were bound by the act of the Liverpool agents. *In re* NEWEN. CARRUTHERS *v.* NEWEN - - **Farwell J. 812**

2. —— *Costs—Taxation—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Sched. I., Part I., Rule* 11—*Purchase and Resale—Payment of Commission to Agent.*

F. and D. introduced certain property to L. for purchase by him, and introduced him to X., who shortly afterwards purchased from L. at an increased price. A commission was paid to F. and D. on each transaction. F. and D. also introduced L. to R., who, acting as the solicitor of L., concluded the contracts between the original vendor and L. and between L. and X. The property was conveyed direct from the original vendor to X., L. joining in the conveyance.

SOLICITOR—*continued.*

The abstract was sent to R., who copied it and forwarded it to the solicitors of X.; on receiving the requisitions he copied them and sent them to the original vendor's solicitors, and a similar operation took place with reference to observations and further requisitions on title:—

Held, that even if R. was employed to negotiate at all, he had not in substance entirely negotiated either the purchase or the resale, and, moreover, that commissions on both the purchase and resale had been paid to agents within the meaning of rule 11 of Sched. I., Part I., to the Order under the Solicitors' Remuneration Act, and that therefore the scale fee for negotiating a purchase or sale was not chargeable:

Held, also, that the scale fees (*a*) for investigating the title and preparing and completing the conveyance on the purchase, and (*b*) deducing the title and perusing the conveyance on the resale, were not chargeable.

In re Read, [1894] 3 Ch. 238, distinguished. *In re* ROMAIN - - - **Buckley J. 702**

3. —— *Fiduciary Relation — Solicitor and Client—Voluntary Settlement—Gift by Client to Solicitor—Sale by Client to Solicitor—Undue Influence—Consideration, Insufficiency of—Separate Solicitor, Duties of — Competent independent Advice—Gift to Children as well as to Solicitor—Severable Deed — Partial Avoidance — Trustee Solicitor-donee, Removability of—Limiting Avoidance to Beneficial Interest—Beneficiaries, Consent of—Form of Order setting aside Deed.*

A gift by a client to his solicitor raises primâ facie the presumption that it was unduly influenced by the fiduciary relation subsisting between them; and the onus is on the solicitor to prove that the gift was uninfluenced by that relation. The presumption is, however, not irrebuttable, but it is not sufficiently rebutted by the mere fact of the client having employed a separate and independent solicitor—even though without any fraud or collusion on the part of the two solicitors—to advise him in the matter of the gift; for the presumption will continue so long as the relation of solicitor and client continues for other purposes outside the gift, or at all events until it can be clearly inferred that the influence arising from the relation no longer exists. On the other hand, there is no objection to a sale by a client to his solicitor, provided the solicitor can prove—(1) that the client was fully informed; (2) that he had competent independent advice; and (3) that the price given was a fair one.

In 1900 the plaintiff, being in pecuniary difficulties, executed a voluntary deed giving part of his property in trust (subject to trusts thereby declared in favour of persons not parties) after his own death in certain shares for two of his children, who were sui juris, and for his solicitor, C., whom he expressed a wish to benefit for services rendered but not yet paid for. C. and one of the two children were the two trustees of the deed, and all three were parties to it. The draft of the deed had been prepared in C.'s office, though not under his supervision, but on his suggestion had been submitted by the plaintiff to a separate solicitor, A., to advise him in

SOLICITOR—*continued.*
the matter, especially in respect of the gift to C., and the deed was executed by the plaintiff on A.'s advice. In all other matters C. continued to act for the plaintiff as before.

In 1901 the plaintiff executed another deed, to which the two children and C. were again parties, whereby the whole of the plaintiff's property, both present and future, was conveyed to the same trustees, discharged from the trusts declared by the deed of 1900 in favour of the two children and C., but to be held upon trust for the same three persons in equal shares, in consideration of a covenant by them to pay the plaintiff a certain annuity during his life. This deed also had been prepared by a separate solicitor, T., who, on C.'s suggestion, had been called in to advise the plaintiff in the matter. C. continued to act in all other matters for the plaintiff as before. No fraud or collusion was found as between C., A., and T. in either transaction, but in neither was A. or T., when advising the plaintiff, fully informed of his actual position or property.

In an action by the plaintiff to set aside both deeds:—

Held, (1) that the deed of 1900 was void as against C., but not as against the children, since the benefits it conferred upon them had not been induced by any undue influence on the part of C.; and

Held, (2) that the deed of 1901 was void altogether as being a transaction of bargain and sale entered into by the plaintiff without, as the evidence shewed, his having been properly advised as to the sufficiency of the consideration and without the advice of an independent solicitor fully cognizant of the facts.

Hatch v. *Hatch*, (1804) 9 Ves. 292; 7 R. R. 195, and *Holman* v. *Loynes*, (1854) 4 D. M. & G. 270, followed.

In the absence of some of the beneficiaries under the deed of 1900, the Court refused to remove C. from being a trustee thereof or to make a declaration as against him further than that the deed was void so far as related to his beneficial interest.

The law as stated by Farwell J. in *Powell* v. *Powell*, [1900] 1 Ch. 243, 247, as to the duty of a separate solicitor called in to advise a donor in the case of an intended gift to a donee standing in a fiduciary relation to the donor, approved of.

Form of declaration setting aside a deed.
WRIGHT *v.* CARTER - - - C. A. 27

—— Representation—Breach of duty—Solicitor and client—Adverse title - - 528
See ESTOPPEL.

SPECIFIC PERFORMANCE—Mistake—Sale by auction—Purchase of wrong lot - 434
See VENDOR AND PURCHASER. 2.

—— "Wilful default" of vendor—Dispute as to form of conveyance - - 509
See VENDOR AND PURCHASER. 1.

STATUTE—Company incorporated by—Power to charge surplus lands—Existing debt
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34 & 35 Hen. 8, c. 20, s. 2—*Fines and Recoveries* - - - - 865
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2 & 3 Will. 4, c. 71, s. 3—*Prescription* - 405
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3 & 4 Will. 4, c. 27, s. 40—*Real Property Limitation* - - - - 781
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3 & 4 Will. 4, c. 74, s. 18—*Fines and Recoveries* 865
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25 & 26 Vict. c. 89, ss. 38, 110—*Companies* 70
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30 & 31 Vict. c. 131, s. 38—*Companies* 586, 766
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33 & 34 Vict. c. 23, ss. 12, 17, 20, 29—*Forfeiture* - - - - 90
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33 & 34 Vict. c. 93, s. 10—*Married Women's Property* - - - - 739
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36 & 37 Vict. c. 66, s. 25, sub-s. 4—*Judicature* 631
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38 & 39 Vict. c. 55, s. 149—*Public Health* 437
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38 & 39 Vict. c. 87, ss. 22–28, 29, 32, 49, 93–96—*Land Transfer* - - - 631
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STATUTES—*continued.*

40 & 41 Vict. c. 18—*Settled Estates* - 836
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40 & 41 Vict. c. 35, s. 1—*Metropolitan Open Spaces* - - - - 109
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44 & 45 Vict. c. 34, ss. 4, 5—*Metropolitan Open Spaces* - - - - 109
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44 & 45 Vict. c. 41, s. 3, sub-s. 4—*Conveyancing and Law of Property* - - 287
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See LIGHT AND AIR. 2.

—— —— s. 11 - - - - - 797
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44 & 45 Vict. c. 44, General Order, Sched. I., Pt. I., r. 11—*Solicitors' Remuneration*
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45 & 46 Vict. c. 38—*Settled Land* - 836
See SETTLED LAND. 4.

—— —— s. 2, sub-ss. 1, 8; s. 38 - 75
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45 & 46 Vict. c. 75, s. 11—*Married Women's Property* - - - - 188
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46 & 47 Vict. c. 57, s. 18, sub-s. 10; s. 19—*Patents, Designs, and Trade Marks* 18
See PATENT. 3.

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47 & 48 Vict. c. 72, s. 3—*Disused Burial Grounds* - - - - 109
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51 & 52 Vict. c. 50, s. 5—*Patents, Designs, and Trade Marks* - - - 18
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53 & 54 Vict. c. 39, ss. 24, 31—*Partnership* 236
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53 & 54 Vict. c. 64, s. 3—*Directors' Liability*
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53 & 54 Vict. c. 69, s. 5—*Settled Land* - 265
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—— —— s. 13, sub-s. ii. - - - 560
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54 & 55 Vict. c. 73, ss. 3, 5, 6—*Mortmain and Charitable Uses* - - - 467
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56 & 57 Vict. c. 53, s. 1 (*m*)—*Trustees* - 446
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57 & 58 Vict. c. 30, s. 9—*Finance* 250, 685
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STATUTES—*continued.*

57 & 58 Vict. c. ccxiii., L. & P., Pt. IX.—*London Building* - - - 287
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60 & 61 Vict. c. 65, s. 20—*Land Transfer* 631
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63 & 64 Vict. c. 48, ss. 14, 15—*Companies*
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STOCK—Municipal borough—Authorized investment - - - - - 446
See TRUSTEE. 2.

STREETS—*New Street*—*Local Government*—*Urban Authority*—*By-laws*—*Special Remedy*—*Penalty recoverable by Summary Proceedings*—*Injunction*—*Jurisdiction*—*Attorney-General as Co-plaintiff*—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 158, 183, 251, 253.

Where persons are laying out a new street in such a manner as not to comply with the requirements of by-laws made by a local authority under the Public Health Act, 1875, which prescribe a penalty for infringement recoverable by summary proceedings before justices, the High Court of Justice has jurisdiction to enforce the by-laws by injunction in an action brought by the Attorney-General at the relation of the local authority and by the local authority. ATTORNEY-GENERAL *v.* ASHBORNE RECREATION GROUND COMPANY
Buckley J. 101

2. —— *Overhead Electric Wires*—*Urban Authority*—*Vesting*—*Road originally acquired by Turnpike Trustees*—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 149.

Under s. 149 of the Public Health Act, 1875, which provides for the vesting in the urban authority of the streets within their district, the question how much above and below the surface of the street vests in the urban authority is determined by reference to what is necessary for the user of the street quâ street, without regard to the circumstances under which the site of the street was originally acquired.

Where, therefore, the site of a street which ultimately vested in the defendants as the urban authority under this section was originally conveyed to turnpike trustees in fee simple for the purposes of making a road under the Turnpike Roads Acts:—

Held, that the property of the defendants in the site of the street was not thereby enlarged, so as to entitle them to prevent electric wires being carried over the street at a height above the area required for the user of the street.

Decision of Farwell J., [1902] 1 Ch. 866, reversed. FINCHLEY ELECTRIC LIGHT COMPANY *v.* FINCHLEY URBAN DISTRICT COUNCIL C. A. 437

—— "New street," Laying out—Injunction—Public body—Attorney-General, Absence of - - - - - 759
See LOCAL GOVERNMENT.

—— Ownership—Soil of highway—Street in town—Crown—Lease—Rebuttal of presumption - - - - 118
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TAXATION—Costs.
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TENANT FOR LIFE — Consent of — Sale — "Land"—Mortmain and charitable uses
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TESTAMENTARY EXPENSES—Direction to pay —Estate duty—Incidence - 250
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TIME—Lapse of—Lien — Merger—Presumption of satisfaction—Interest - - 781
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—— Lapse of—Sale of leaseholds by executor—Actual notice to purchaser that no debts of testator remain unpaid - - 65
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TITLE — Leasehold house — Open contract — Breach of covenant to repair—Production of receipt for rent - - 287
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TITLE-DEEDS—Non-negotiable securities—Custody - - - - - 262
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—— Possession of—Equitable mortgage—Notice —Fraud—Forged receipt—Priority 428
See VENDOR AND PURCHASER. 3.

TRADE FIXTURES—Covenant—Construction—General words - - - 806
See LANDLORD AND TENANT. 2.

TRADE-MARK—*Old Mark—Registration—Lapse — Re-registration — Action for Infringement — Passing off Goods—Advertisements and Circulars —Motion to expunge Trade-mark—Delay—Costs —Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 54, 64, 77 (*a*), 79, *and* 90 —*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 18.

A trade-mark may be infringed by being used in the advertisements and circulars of a rival trader, if it is used in them in relation to or connection with the same class of goods, and in such a manner as to be calculated to deceive.

TRADE-MARK—*continued.*

Delay in moving to rectify the register by expunging therefrom a trade-mark will as a general rule deprive a successful applicant of his costs; but he may be refused relief altogether if his delay has placed the respondent at an unfair disadvantage, e g., if material evidence has been lost to the respondent by reason of the delay.

A. was the owner of two trade-marks. One was the figure of a "Swan," with adjuncts, and the other was the word "Swanbill." Both marks were registered as old marks in 1876 in respect of the same class of goods, and for many years were used together. In 1890 A. per incuriam allowed the registration of the word "Swanbill" to lapse, but in 1892 registered it again as an old mark. In 1901 he brought an action against B. & Co. for infringing his trade-mark of a "Swan" in their advertisements and circulars; and thereupon they moved to expunge both of A.'s marks from the register. They had become aware in 1896 of the registration in 1892 of the word "Swanbill." The action and motion were tried together, and at the trial B. & Co. abandoned their motion so far as it sought to expunge A.'s trade-mark of a "Swan," but succeeded in expunging the word "Swanbill." The action was dismissed. Under the circumstances, and having regard to B. & Co.'s delay in moving to rectify the register, A. was ordered to pay only two-fifths of the taxed costs of the action and motion.

In re Talbot's Trade-mark, (1894) 11 Rep. Pat. Cas. 77, followed.

An application by A. for a certificate under s. 77 (*a*), on the ground that the validity of his trade-mark of a "Swan" had come in question, was refused.

Observations on the distinction between a passing-off action and a common law action for deceit.

London General Omnibus Co. v. *Lavell*, [1901] 1 Ch. 135, commented on. BOURNE *v.* SWAN & EDGAR, LIMITED. *In re* BOURNE'S TRADE-MARKS. Farwell J. 211

TRANSFER—Land transfer.
See under LAND TRANSFER.

TRUST.
See under TRUSTEE.

TRUSTEE—*Infants—Arrangement altering Trust Property for Benefit of Infants—Compromise—Jurisdiction of Court to approve—Trust—Administration.*

Henry Wells, who died in 1883, gave his residuary estate to trustees upon trust, to pay certain annuities to his two daughters and other persons for their lives, and, after the death of the last surviving annuitant, for such of the children of his two daughters as should be then living and should attain twenty-one or marry.

In 1902 the two daughters, their surviving children, and all other parties interested under the will, executed a deed whereby, subject to the approval of the Court, it was agreed that the trusts of the will should be put an end to, and instead thereof the trustees should hold the property upon trust to purchase Government annuities for the annuitants, and pay the residue to the children then living or the trustees of those who had settled their shares, making their interests

TRUSTEE—*continued.*
absolute instead of contingent. Two of the children had executed settlements under which infants were or might become interested:—

Held, that the Court had jurisdiction to approve the scheme on behalf of the infants.

Peto v. *Gardner*, (1843) 2 Y. & C. Ch. 312; 60 R. R. 165, and *Day* v. *Day*, (1845) 9 Jur. 785, not followed. *In re* WELLS. BOYER *v.* MACLEAN
Farwell J. 848

2. —— *Investment, Authorized—Stock of Municipal Borough—Limit of Population—Returns of last Census—Corporation—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 1 (*m*).

In the returns of the census, taken in April, 1901, it is stated that the population of the borough of Bournemouth was 47,003. But in a note at the foot of the page it is stated that, by an order of the Local Government Board, which came into operation on November 9, 1901, the borough was extended so as to embrace two specified urban districts and parts of two other parishes, and that the figures at the date of the census were for Bournemouth 59,762:—

Held, that under s. 1 (*m*) of the Trustee Act, 1893, trustees were authorized to invest in stock issued by the corporation.

Decision of Joyce J. reversed. *In re* DRUITT. DRUITT *v.* DEHLER - - - **C. A. 446**

3. —— *Investment, Unauthorized—Breach of Trust—Partly paid Shares—Death of Co-trustee—Call on Shares—Contribution.*

Two trustees in breach of trust invested trust funds in partly paid shares of a company.

Some years after the death of one trustee, the survivor, who had made every reasonable effort to dispose of the shares, but without success, paid a call of 800*l.* as a contributory in the liquidation of the company:—

Held, that the deceased trustee's representatives, though not liable to the company for the call, were liable to the surviving trustee for contribution.

Ashhurst v. *Mason*, (1875) L. R. 20 Eq. 225, explained and applied. JACKSON *v.* DICKINSON
Swinfen Eady J. 947

4. —— *Investment, Unauthorized, Change of—Emergency—Sanction of Court—Jurisdiction—Trust—Administration—Management.*

The rule laid down in *In re New*, [1901] 2 Ch. 534, as to the exercise by the Court of its extraordinary jurisdiction in relation to the administration of trusts, in sanctioning acts by trustees going beyond the express provisions of the trust instrument, is limited to cases of emergency, and does not cover every case in which a particular act is desired to be done merely because it appears beneficial to the estate. For instance, the Court will not sanction an unauthorized change of investment proposed on the mere ground that it will be to the advantage of the beneficiaries.

Decision of Kekewich J., [1903] 1 Ch. 457, affirmed. *In re* TOLLEMACHE - **C. A. 955**

5. —— *Title-deeds—Non-negotiable Securities—Custody.*

In the absence of special circumstances, a trustee is not entitled to have title-deeds and non-negotiable securities removed from the custody of a co-trustee and placed at a bank, in a box accessible only to the trustees jointly. *In re* SISSON'S SETTLEMENT. JONES *v.* TRAPPES
Swinfen Eady J. 262

TRUSTEE—*continued.*
—— Appointment—Solicitor of tenant for life—Existing trustees—Affidavit of fitness
See SETTLED LAND. 6. **75**

—— Investment—Railway or other "public company"—American company - **352**
See WILL. 10.

—— Lease to trustee for donee of power—Covenants—Settled estates - - **836**
See SETTLED LAND. 4.

—— Notice to one of several trustees—Death of trustee who had notice—Priority **183**
See ASSIGNMENT.

—— Remoteness—Invalid trust for sale of realty—Validity of gift—Conversion - **565**
See WILL. 14.

—— Removability of trustee solicitor-donee—Fiduciary relation - - - **27**
See SOLICITOR. 3.

ULTRA VIRES—Company—Contributory—Fully paid shares—Want of consideration **674**
See Company. 12.

—— Company—Reconstruction—Sale of undertaking—Consideration—Commission
See COMPANY. 9. **295**

UNDERLEASE—Mortgage by—Merger—Lease—Subsequent purchase by lessee of freehold reversion - - - **631**
See MERGER.

UNDUE INFLUENCE—Solicitor and client—Fiduciary relation—Setting aside deed
See SOLICITOR. 3. **27**

VENDOR AND PURCHASER—*Contract for Sale of Real Estate—Non-completion on Appointed Day—Interest on Purchase-money—"Wilful Default" of Vendor—Dispute as to Form of Conveyance—Specific Performance—Account of Rents and Profits received by Vendor—Land in Occupation of Vendor—Occupation Rent.*

An agreement dated September 26, 1898, for the sale of land provided that, if from any cause whatever, other than wilful default on the part of the vendors, the completion of the purchase should be delayed beyond January 2, 1899, the purchase-money should bear interest at 5 per cent. per annum. The title having been accepted, a dispute arose about the form of the conveyance, and the purchase was not completed on the day fixed. On June 12, 1899, the vendors threatened in effect that, if the purchaser did not within ten days assent to the form of conveyance which they proposed, they would cancel the contract and forfeit the deposit. On June 22, 1899, the purchaser commenced an action for specific performance of the contract. At the trial on February 2, 1900, Buckley J. held that the purchaser was in the right as to the form of the conveyance, and gave judgment for specific performance, with costs up to the date of the judgment. The judgment directed that interest (if

VENDOR AND PURCHASER—*continued.*

any) should be computed on the balance of the purchase-money from January 2, 1899, and that an account should be taken of the rents and profits of the land received by the defendants since January 2, 1899; and it was ordered that what should be coming on the account of rents and profits should be deducted from the amount of the purchase-money and interest when computed. On a motion by the plaintiff to vary the master's certificate, Buckley J. held that there had been no "wilful default" by the vendors, and that, even if there had been, the delay in completion was due, not to the default, but to the inability of the purchaser to find the money to complete the purchase, and consequently that the purchaser must pay interest on the balance of the purchase-money from January 2, 1899, down to completion:—

Held, by Stirling and Cozens-Hardy L.JJ. (Vaughan Williams L.J. dissenting), that either there had been no wilful default by the vendors, or, if there had been, the delay in completion was not due to the default, and that the decision as to payment of interest was right.

Per Vaughan Williams L.J. The delay was caused by wilful default on the part of the vendors, and the purchaser ought not to pay interest.

Per Stirling L.J. There had been wilful default on the part of the vendors, but it was not the cause of the delay.

Per Cozens-Hardy L.J. There had been no wilful default on the part of the vendors.

Decision of Buckley J., [1902] 1 Ch. 226, affirmed.

Per Vaughan Williams L.J. *In re Woods and Lewis' Contract*, [1898] 1 Ch. 433; [1898] 2 Ch. 211, has left untouched the proposition laid down by Bowen L.J. in *In re Young and Harston's Contract*, (1885) 31 Ch. D. 168, 174–5, and also the observations of Lindley L.J. in *In re Hetling and Merton's Contract*, [1893] 3 Ch. 269. Nor did Lindley L.J. in *In re London Corporation and Tubbs' Contract*, [1894] 2 Ch. 524, qualify the definition of "wilful default" given by Bowen L.J. in *In re Young and Harston's Contract*, 31 Ch. D. 174–5.

Per Stirling L.J. In *In re London Corporation and Tubbs' Contract* the Court of Appeal did not intend to depart from the general rule laid down in *In re Young and Harston's Contract*. Nor was it intended to lay down that every case of honest mistake by a vendor is outside that rule. So to hold would be inconsistent with *In re Hetling and Merton's Contract*.

Per Stirling and Cozens-Hardy L.JJ. As regards wilful default, there is no distinction between a mistake of the vendor as to title and a mistake as to evidence of title or as to conveyance.

The judgment at the trial directed that an account should be taken of rents and profits received by the vendors. Part of the property was in the occupation of the vendors:—

Held, that the vendors were not chargeable with occupation rent for that part of the property which was in their occupation.

Decision of Buckley J., [1902] 1 Ch. 226, affirmed. BENNETT *v.* STONE - **C. A. 509**

VENDOR AND PURCHASER—*continued.*

2. —— *Mistake—Sale by Auction—Purchase of Wrong Lot—Concensus ad Idem—Contract—Wrong Date—Memorandum in Writing—Specific Performance—Statute of Frauds* (29 *Car.* 2, *c.* 3).

At a sale by auction of landed property on November 18, 1901, the defendant bid for one lot by mistake for another, and it was knocked down to him. On discovering his mistake he refused to sign the contract, whereupon the auctioneer signed it as his "agent."

The printed particulars, conditions, and annexed form of contract had been prepared for a sale on "October 17, 1901," which was postponed till November 18, but by inadvertence the original date, though altered in the particulars, remained in the conditions and form of contract:—

Held, that there was no contract within the Statute of Frauds, nor, *semble*, any concensus ad idem, to support an action by the vendor for specific performance.

Decision of Kekewich J., [1902] 2 Ch. 266, reversed. VAN PRAAGH *v.* EVERIDGE **C. A. 434**

3 —— *Priority—Equitable Mortgage—Notice—Fraud of Vendor's Solicitor—Legal Estate—Possession of Title-deeds—Forged Receipt—Liability as between two Innocent Persons.*

A purchaser who has, before completion of his purchase, received notice of an outstanding equitable interest must, in order to get a good title from his vendor, take care to see that that interest is got in or destroyed. If he chooses to complete in reliance upon the assurance of the vendor, or of the vendor's solicitor, that the interest has been got in or destroyed, he does so at his own risk if it turns out that the interest is still outstanding, and the conveyance to him of the legal estate, accompanied by the delivery (unknown to the owner of the equitable interest) of the title-deeds, affords him no protection against the prior equitable interest.

Prior to the completion of a purchase of leaseholds the purchaser's solicitors discovered the existence of an equitable mortgage not disclosed by the abstract, and required it to be discharged. On completion of the purchase the vendor's solicitor, who was also the solicitor of the equitable mortgagee, produced the memorandum creating the equitable mortgage with what purported to be a receipt, signed by the mortgagee, for all moneys due on the security; an assignment of the property by the vendor to the purchaser, passing the legal estate, was then executed, and the equitable mortgage, the receipt, and all the other title-deeds, were handed to the purchaser. The receipt turned out to be a forgery, and on an action being brought by the equitable mortgagee against the purchaser to establish the priority of his charge:—

Held, affirming Byrne J., [1902] 2 Ch. 399, that as the defendant had purchased with notice of an incumbrance which, as a fact, was still subsisting, the legal estate and possession of the title-deeds afforded no protection, and that the plaintiff's equitable mortgage therefore had priority, and was still enforceable against the defendant. JARED *v.* CLEMENTS - **C. A. 428**

VENDOR AND PURCHASER—*continued.*

4. —— *Title—Leasehold House—Open Contract—Repairs—Breach of Covenant to Repair—Receipt for Rent, Production of—Local Authority—Dangerous Structure—Notice to Repair—Magistrate's Order—"Outgoing," Liability for—Good Title—Specific Performance—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict.* c. 41), *s.* 3, *sub-s.* 4—*London Building Act*, 1894 (57 & 58 *Vict. c. cxxiii., L. & P.*), *Part IX.*

A purchaser on July 1, 1901, entered into an open contract with a vendor for the purchase of a leasehold house, the lease of which contained a covenant by the lessee to keep in good repair. At the date of the contract the purchaser was aware that the lease contained such a covenant; he was also aware from previous inspection that the house was, as the vendor in fact admitted, in bad repair, and on that account the vendor agreed to accept a reduced price. The Court held that November 6 was the date fixing the rights and liabilities of the parties under the contract. On September 27 the vendor was served with a "dangerous structure" notice from the London County Council under the London Building Acts, 1894 and 1898, requiring him to pull down or render secure a part of the house. The notice not being complied with, a police court order was made on November 1 requiring him to do the repairs within fourteen days from service of the order, but he was not served with it till November 9. On October 24 the vendor paid the Michaelmas rent due under his lease, and he produced the receipt for it to the purchaser.

Upon a summons taken out by the vendor under the Vendor and Purchaser Act, 1874, for a declaration that he had made a good title and that the expenses of complying with the police court order should be borne by the purchaser:—

Held, apart from the question as to the date at which the requirements of the "dangerous structure" notice and the subsequent police court order had ripened into an obligation—as to which the Court expressed no opinion—that the purchaser had proved a breach of the vendor's covenant to repair, and that therefore s. 3, sub-s. 4, of the Conveyancing Act, 1881—which requires a purchaser of leaseholds, on production of the receipt for the last payment due for rent, to assume, "unless the contrary appear," that all the covenants of the lease have been performed—did not apply, since the contrary did appear; and that, on the authority of *Barnett* v. *Wheeler*, (1841) 7 M. & W. 364, the vendor's obligation to make a good title was not removed by the knowledge of the purchaser at the date of the contract that the title was bad by reason of the breach of covenant: and accordingly that the expense of complying with the police court order must be borne by the vendor.

But *semble*, per Romer L.J., having regard to the reduced price the vendor had, in the circumstances, agreed to accept, the case would not have been one for enforcing specific performance in an action against him.

On a sale of leaseholds, the production by the vendor of the receipt for rent last due is not, under s. 3, sub-s. 4, of the Conveyancing Act, 1881, in itself conclusive evidence of the due performance of the covenants of the lease: it is only evidence of due performance "unless the contrary appears"; and therefore, notwithstanding the production of the receipt, it is open to the purchaser to adduce evidence of non-performance as a ground for resisting specific performance.

Decision of Swinfen Eady J., [1902] 2 Ch. 214, affirmed. *In re* HIGHETT AND BIRD'S CONTRACT **C. A. 287**

5. — *Title—Leaseholds by Executor, Sale of—Lapse of Time—Actual Notice to Purchaser that no Debts of Testator remain Unpaid.*

A testator by his will appointed his wife sole trustee and executrix thereof, and gave to her all his estate upon trust for sale or conversion for the benefit of herself during life or widowhood, and declared it to be his wish that, unless circumstances otherwise required it, his leasehold estates should not be converted during the life or widowhood of his wife, and at her death or marriage he bequeathed a leasehold house to his son. Eighteen years after the death of the testator the widow entered into a contract for sale of the leasehold house. Her solicitors informed the purchaser that there were no debts of the testator remaining unpaid. No reason for selling was suggested. The purchaser objected to the title, unless the concurrence of the son was obtained, but this was refused:—

Held, that, under the peculiar circumstances of the case, the purchaser having actual notice that there were no debts of the testator remaining unpaid, and no reason being suggested for the sale, the title was not one which ought to be forced on a purchaser. *In re* VERRELL'S CONTRACT **Kekewich J. 65**

—— Representation — Solicitor and client — Breach of duty—Adverse title - **528**
See ESTOPPEL.

—— Voluntary settlement — Assignment — Expectancy—Power of trustees to call for transfer - - - - **697**
See SETTLEMENT. 3.

VENTRE SA MÈRE—Child en—Relation back—Equitable contingent remainders **874**
See PERPETUITY.

VESTED OR CONTINGENT—Residue to individuals in shares at twenty-one—Maintenance clause - - - **448**
See WILL. 18.

VESTING—Name clause—Condition precedent or subsequent—Forfeiture - **749**
See WILL. 12.

VOLUNTARY SETTLEMENT.
See under SETTLEMENT.

—— Solicitor and client—Fiduciary relation **27**
See SOLICITOR. 3.

WAIVER CLAUSE — Prospectus — Liability of director—"Knowingly issue." - **766**
See COMPANY. 7.

WATER—*Waterworks Company—Surplus Profits —"Dividend" — Prescribed Rate — Making up Deficiency of Previous Dividend—Deficiency prior*

WATER—*continued.*

to Incorporation of General Act — Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 1, 75.

A water company has no power to apply its surplus profits in making up to its ordinary stockholders any deficiency in the prescribed rate of dividend or a full 10*l.* per cent. dividend, if that is the prescribed rate, for any back years prior to the coming into operation of the Waterworks Clauses Act, 1847.

Scheme of the Waterworks Clauses Act and meaning of "dividend" discussed.

Decision of Joyce J. affirmed. LAMPLOUGH *v.* COMPANY OF PROPRIETORS OF KENT WATERWORKS
C. A. 575

WIFE—Husband and.
See under HUSBAND AND WIFE.

WILFUL DEFAULT—Dispute as to form of conveyance - - - - 509
See VENDOR AND PURCHASER. 1.

WILL — *Absolute Gift — Personalty — Trust for Person "entitled to the Possession or Receipt of the Rents" of Settled Estates—Actual Possession—Intention.*

A testator bequeathed certain chattels to trustees upon trust to permit the same to be enjoyed by the person for the time being "in the actual possession or entitled to the receipt of the rents and profits" of real estates settled by his will.

He also bequeathed the proceeds of sale and conversion of his residuary real and personal estate to the trustees on trust to pay the income to the person for the time being "entitled to the possession or receipt of the rents" of the settled estates.

The words "entitled to the possession or receipt of the rents" or their equivalents were used in numerous other clauses of the will, in all of which they necessarily referred to actual possession, though not so expressed:—

Held, that a tenant in tail, who predeceased the life tenant, had, subject to her interest, become absolutely entitled to the residuary estate, but not to the chattels.

Foley v. *Burnell*, (1783) 1 Bro. C. C. 274; (1785) 4 Bro. P. C. 319, *Martelli* v. *Holloway*, (1872) L. R. 5 H. L. 532, *Lord Scarsdale* v. *Curzon*, (1860) 1 J. & H. 40, and *In re Angerstein*, [1895] 2 Ch. 883, applied. *In re* FOTHERGILL'S ESTATE. PRICE-FOTHERGILL *v.* PRICE
Swinfen Eady J. 149

2. —— *Ademption—General Legacy — Particular Purpose—Infant.*

A legacy to a trustee for the benefit of an infant, to whom the testator is not in loco parentis, is not given for a particular purpose within *Pankhurst* v. *Howell*, (1870) L. R. 6 Ch. 136, and *In re Pollock*, (1885) 28 Ch. D. 552, 556, so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose. *In re* SMYTHIES. WEYMAN *v.* SMYTHIES
Swinfen Eady J. 259

—— "Advances"—Double portions—Parent and child—Ademption - - - 267
See No. 13, *below.*

3. —— *Advancements—Gift of Residue subject*

WILL—*continued.*

to Annuity for Life—Advancement of Parts of Residue—Hotchpot—Interest—Period of Distribution.

W. had three sons, H., S., and B. On the marriage of H. in 1866 W. conveyed upon the trusts of H.'s marriage settlement real estate of the value of 4000*l.*, and by the settlement covenanted to pay 6000*l.* to the settlement trustees within six calendar months after the death of the covenantor. H. died before W.

W. died in June, 1893, having by his will, after giving certain legacies, and, to his wife, an annuity, given his residuary estate to trustees upon trust, as to one-third, for S., and as to another one-third for B. The remaining one-third was directed to be transferred to the trustees of H.'s settlement to be held upon the trusts thereof, but subject to the proviso that after payment of the 6000*l.* the sum of 10,000*l.* (the 6000*l.* plus the 4000*l.*) should be considered to have been received and advanced out of residue in respect of H.'s portion, and should, for the purpose only of ascertaining the amount of that portion, be considered as part thereof, and should be accounted for in the way of hotchpot accordingly.

On December 6, 1893, the trustees of the will paid the 6000*l.* to the settlement trustees. B. died in August, 1893, and under his will his widow was tenant for life. The trustees of W.'s will made payments of equal amounts from time to time (1) to S. and (2) to B. and the trustees of his will. Part of each sum was treated as capital, and the rest (of which half was paid to B.'s widow) as income.

On the death of W.'s widow in 1902 the sum set apart to answer her annuity fell into residue:—

Held, on the authority of *In re Rees*, (1881) 17 Ch. D. 701, *In re Dallmeyer*, [1896] 1 Ch. 372, and *In re Lambert*, [1897] 2 Ch. 169, (1) that the date of distribution (notwithstanding the existence of the annuity) was the death of W., and that interest was chargeable on the advance made in his lifetime as from the date of his death and on advances made after his death, as from the date of those advances; (2) that no distinction was to be made between the advances made on account of capital and those made on account of income in respect of the shares of S. and B.; (3) that the rate of interest to be charged was 3 per cent. only.

In *In re Lambert* Stirling J. laid down a general rule as to the rate of interest chargeable. The opinion to the contrary of Joyce J. in *In re Hargreaves*, (1902) 86 L. T. 43, dissented from.

The report of *Hilton* v. *Hilton*, (1872) L. R. 14 Eq. 468, corrected. *In re* WHITEFORD. INGLIS *v.* WHITEFORD - - - Buckley J. 889

4. —— *Advancements—Legacy—Satisfaction—Parent and Child—Double Portions—Gift by Parent to Child after Date of Will.*

A father by his will made in 1891 gave the residue of his estate on trust for his children living at his death in specified proportions. And he declared that if any child should die in his lifetime, leaving a child or children who being a son or sons should attain twenty-one, or being a

daughter or daughters should attain that age or marry under that age, such child or children should take (and if more than one equally between them) the share which his or their parent would have taken in the testator's residuary estate if the parent had survived him. The testator also declared that the sum of 5000*l.* which he had already given to each of his daughters was not to be brought into account in ascertaining the share of a daughter in his residuary estate.

The testator carried on business in partnership with his eldest son John. The partnership deed provided that the son should not withdraw any part of his capital without his father's consent.

In 1892 the testator voluntarily gave his second son Alfred a sum of 5000*l.*

In 1894 the testator made a codicil slightly altering his will, and in all other respects confirming it.

In 1897, at the request of the son John, who had overdrawn his capital and was in pecuniary difficulties, the testator transferred 5000*l.* from his own capital account in the books of the firm to the capital account of the son, and also gave him 1500*l.* to enable him to pay off in part a mortgage debt.

In January, 1899, the son John died, leaving an only daughter, who afterwards married.

In May, 1899, the father died, leaving the son Alfred and six daughters surviving him.

Two of the daughters deposed to conversations with their father in which he spoke of the payment of the 5000*l.* to his son Alfred, and led them to believe that he never intended that that sum should be taken into account on his own death, but should be treated in the same manner as the two sums of 5000*l.* given to themselves were to be treated:—

Held, that the legal presumption that the gifts made by the testator to his two sons were intended as portions was under the circumstances rebutted, and that those sums ought not to be brought into account in the distribution of the testator's estate.

Decision of Kekewich J. affirmed.

But *held* (differing in this respect from Kekewich J.), that the daughter of the son John stood in the same position as her father, so that, if he would have had to account for the sums given to him by his father in his lifetime, she would have been equally liable to account for them.

The view taken by Jessel M.R. in *Taylor* v. *Taylor*, (1875) L. R. 20 Eq. 155—that a sum expended by a father in paying his son's debts is not necessarily an advance to the son by way of portion, but may be regarded as a temporary assistance—preferred to the view taken by Wood V.-C. in *Boyd* v. *Boyd*, (1867) L. R. 4 Eq. 305, and by Pearson J. in *In re Blockley*, (1885) 29 Ch. D. 250. *In re* SCOTT. LANGTON *v.* SCOTT

C. A. 1

5. —— *Annuities "without any Deduction except Legacy Duty," Gift of—Will made before passing of the Customs and Inland Revenue Act*, 1888*—Republication by Codicil after passing of the Act—Succession Duty—Estate Duty—Construction of Will—Customs and Inland Revenue*

Act, 1888 (51 *Vict. c.* 8), *s.* 21—*Finance Act*, 1894 (57 *& 58 Vict. c.* 30), *s.* 9.

A testator by his will made in 1882 gave an annuity to H. for her life, and after her death (in the events which happened) he gave annuities to her three children, and charged all the annuities on his real estate, and directed that they should be paid "without any deduction except for legacy duty and income tax." By a codicil, made after the passing of the Customs and Inland Revenue Act, 1888, he made certain dispositions, and in all other respects confirmed his said will.

By the Customs and Inland Revenue Act, 1888, s. 21, legacy duty was abolished, and the duties under the Succession Duty Act, 1853, and certain additional duties, were made chargeable in respect of legacies (whether given by way of annuity or in any other form) charged on the real estate of any person dying after July 1, 1888.

The testator died in 1892. H. died in 1900; and thereupon estate duty and succession duty became payable in respect of the annuities given to her children, and the question arose who was liable to pay the same:—

Held, following *In re Champion*, [1893] 1 Ch. 101, that the effect of the codicil was to republish the will as from the date of the codicil:

Held, also, that the testator, when he republished his will, must be taken to have known that there was then no legacy duty; that it was a case of falsa demonstratio; and that the testator intended the annuitants to pay that duty which at that date was in fact chargeable in respect of the annuities:

Held, further, that the estate duty was payable out of the testator's residuary personal estate. *In re* RAYER. RAYER *v.* RAYER

Farwell J. 685

6. —— *Class—"My own Nephew and Nieces"—Half-blood—Husband's Nephew described as "My Nephew"—Great-niece described as "my Niece."*

The question whether a husband's nephew described in a will as "my nephew" and a great-niece described as "my niece" are entitled to share in a gift to "my own nephews and nieces" depends in every case on the particular will and the evidence, no hard and fast rule in the affirmative being laid down by *In re Jodrell*, (1890) 44 Ch. D. 590; [1891] A. C. 304, or in the negative by *Smith* v. *Lidiard*, (1857) 3 K. & J. 252, *Wells* v. *Wells*, (1874) L. R. 18 Eq. 504, or *Merrill* v. *Morton*, (1881) 17 Ch. D. 382.

Nephews and nieces of the half-blood are primâ facie entitled to share in such a gift.

Grieves v. *Rawley*, (1852) 10 Hare, 63, followed. *In re* COZENS. MILES *v.* WILSON

Swinfen Eady J. 188

7. —— *Contingent Remainder—Gift of Realty to "A. and his Heirs"—Gift over if A. "die without an Heir"—Estate Tail—Ultimate Gift to "Survivor's Heir or Heirs"—Construction of Will.*

A testator gave his two cottages, Nos. 9 and 12, Chapel Street, Sheerness, to his daughter C. G. for life, "after her death No. 12 to go to her youngest daughter E. G. and her heirs, and No. 9 to go to her son W. G. and his heirs, if

either the said E. G. or W. G. should die without an heir their share is to go to the survivor's heir or heirs."

E. G. died in 1891, a spinster; and W. G. died in 1897, a bachelor. C. G. died in 1902:—

Held, that E. G. and W. G. took estates tail in the cottages devised to them respectively:

But *held*, that the gift over to "the survivor's heir or heirs" was a gift to the heirs general of the survivor and a contingent remainder, which took effect as to the cottage devised to E. G. in tail. *In re* WAUGH. WAUGH *v.* CRIPPS

Farwell J. 744

8. —— *Estate Duty — Incidence — General Power—Appointed Fund—Residue—Direction to pay Testamentary Expenses—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

A testatrix, having directed the executors and trustees of her will to pay her testamentary expenses, bequeathed (inter alia) certain specific personalty, over which she had a general power of appointment, to her trustees upon trust for certain specific legatees.

She devised and bequeathed her residuary real and personal estate to her trustees upon trust for sale and conversion, the net proceeds to be paid to certain residuary legatees. The testatrix died on June 20, 1898:—

Held, that the appointed fund had passed to the executors "as such" within the meaning of the Finance Act, 1894, s. 9, sub-s. 1, so that the estate duty was payable out of residue:

Held, also, that the will itself imposed this duty on the residue, the residuary estate being what remained after satisfying the previous dispositions of the will, including the direction to pay testamentary expenses, which covered estate duty: *In re Clemow*, [1900] 2 Ch. 182. *In re* FEARNSIDES. BAINES *v.* CHADWICK

Swinfen Eady J. 250

9. —— *Illegitimate Child — Construction of Will.*

A testator gave the proceeds of Blackacre upon trust for the children of his nephew George, "including amongst such children Samuel, the illegitimate son of my said nephew," and the testator elsewhere in the will recognised Samuel as his nephew's son. The testator then gave the proceeds of Whiteacre upon trust (in the events which happened) for such of eight named nephews and nieces (including George) as should be living at the death of his niece Mary, and the issue living at the death of his said niece of such of his other nephews and nieces as should die in her lifetime leaving issue. George died in the lifetime of Mary, leaving issue one illegitimate son, namely, Samuel. Upon the death of Mary:—

Held, that the illegitimate son was entitled to take under the latter gift. *In re* SMILTER. BEDFORD *v.* HUGHES - - **Kekewich J. 198**

10. —— *Investment, Trust for—Railway or other "Public Company"—American Company—Construction of Will.*

A testatrix, after empowering her trustees to postpone the sale or conversion of any part of her estate, declared that any money by her will directed to be invested should be invested in "any of the public funds, or in Government or

real or leasehold securities, or upon the stocks, shares, or securities of any railway or other public company." Some time after her death two shares which she had held in an English steamship company were exchanged for preference and ordinary stock in an American steamship company which had taken over the business of the English company:—

Held, that the words "public company," when read in connection with the preceding words of the clause, must be confined to public companies in the United Kingdom, and consequently that the trustees were not authorized to retain the American preference and ordinary stock as an investment. *In re* CASTLEHOW. LAMONEY *v.* CARTER - - - - **Byrne J. 352**

11. —— *Mistake—Misdescription of Gift—"My Freehold Land and Hereditaments at M."—Customary Freeholds.*

The word "freehold" may refer either to the quality or to the tenure of an estate.

Devise of "my freehold land and hereditaments at M.," in Westmoreland:—

Held, to pass not only freeholds, but also privileged copyholds, on the ground that the latter were known as "freeholds" or "customary freeholds" in the locality, and the testatrix was unaware of any distinction of tenure. *In re* STEEL. WAPPETT *v.* ROBINSON

Swinfen Eady J. 135

12. —— *Name Clause—Condition—Preceding Life Estate—Condition Precedent or Subsequent—Non-performance of Condition — Remainder in Fee—Forfeiture—Vesting—Devise of Real Estate.*

A testator, who died in 1853, devised his real estate upon trust for his daughter for life, and after her death for her children; and if she should have no child he devised his real estate to N. in fee, on condition that in case the testator's wife should be then living she should have the use for the then remainder of her life of the testator's residence, and on further condition that N. should "take and use" the testator's name only, but subject to the payment of certain legacies which the testator bequeathed only if his daughter should have no child, and should be payable at her death exclusively out of the estates devised to N.

The testator's daughter and N. both survived the testator, but his wife was dead. The daughter, who was now in her fifty-ninth year, was married, but had had no children. N. died in her lifetime intestate, without having taken the testator's name:—

Held, upon the construction of the will, that the condition requiring N. to take and use the testator's name was a condition subsequent, that is, a condition to operate only upon N. becoming entitled to the possession of the estate by the death of the daughter without children, and not before; and that as he had been prevented from performing it by the act of God, the estate would, on the death of the daughter without children, vest absolutely in his legal personal representative freed from the condition.

Decision of Joyce J., [1902] 2 Ch. 198, reversed.

If a condition attached to a devise is capable

of being construed either as a condition precedent or as a condition subsequent, the Court will prefer the latter construction. *In re* GREENWOOD. GOODHART *v.* WOODHEAD - - C. A. 749

13. —— *Portions—Double Portions — Parent and Child — "Advances" — Legacy — Personal Estate, Gift of—Share of Residue—Real Estate, Subsequent Purchase of—Satisfaction—Ejusdem Generis—Ademption—Construction of Will.*

A testamentary direction that the testator's married daughter should not take the benefit of a specific devise to her of real estate or her share of his residuary personal estate "without first bringing into hotchpot as part of my residuary personal estate the total amount of any advances or moneys lent by me to my said daughter and her husband, or either of them":—

Held, upon the construction, affirming Buckley J., not to include real estate subsequently purchased by the testator for the benefit of his daughter and her husband, and by his direction conveyed, as to part, to the daughter, and, as to the rest, to the husband; or any moneys expended, also for their benefit, upon the real estate so purchased.

The rule established by *Holmes* v. *Holmes*, (1783) 1 Bro. C. C. 555—that the presumption against double portions will not prevail where the testamentary portion and subsequent advancement are not ejusdem generis—has been left untouched by modern decisions.

The observations of North J. in *In re Vickers*, (1888) 37 Ch. D. 525, 534, upon *In re Lawes*, (1881) 20 Ch. D. 81, dissented from. *In re* JAQUES. HODGSON *v.* BRAISBY - C. A. 267

14. —— *Remoteness—Invalid Trust for Sale of Realty—Validity of Gift—Conversion—Share of Proceeds, whether Real or Personal Estate.*

A testator who died in 1854 devised his real estate, in certain events, upon trust for sale, and gave the proceeds of sale among classes of persons who were all ascertainable without infringing the rule against perpetuity. The trust for sale was admitted to be bad as not being limited to take effect within the prescribed period; the will contained no direct gift of the income of the property until sale in favour of the persons entitled to the proceeds of sale if the trust for sale had been good:—

Held, affirming the decision of Byrne J., that, as the persons who were intended by the testator to take the beneficial interest in his property were persons who could be ascertained within the rule against perpetuities, the gift to them was good; that though the trust for sale was bad, it was mere machinery for the purposes of division, and could be disregarded, and that the beneficiaries took the property as real estate.

Dictum of Stirling J. in *Goodier* v. *Edmunds*, [1893] 3 Ch. 455, adopted.

In re Daveron, [1893] 3 Ch. 421, approved. *In re* APPLEBY. WALKER *v.* LEVER. WALKER *v.* NISBET - - - - C. A. 565

15. —— *Residuary Gift of "Estate and Effects" to Trustees, "their Executors, Administrators and Assigns"—Trusts pointing to Personalty—Realty—Resulting Trust—Construction of Will.*

A will contained the following gift: "As to all my ready money, securities for money, stock in any of the public stocks of Great Britain, and all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, I give and bequeath the same and every part thereof to the said K. and S."—whom the testator had already appointed his executors—"their executors, administrators and assigns," upon trusts which related to the income, described as "income" or "interest dividends and annual proceeds" (in some places "produce") and to corpus described sometimes as "the said trust moneys, stocks, funds, and securities," and in other places as "the said trust moneys." The will empowered the trustees to vary the securities of the trust money and invest the same:—

Held, that the testator's real estate passed by the gift of residue, and that, notwithstanding the suggested inapplicability of the trusts to anything but personalty, those trusts applied also to the real estate—of which there was, therefore, no resulting trust.

The principles of *D'Almaine* v. *Moseley*, (1853) 1 Drew 629, *Fullerton* v. *Martin*, (1853) 22 L. J. (Ch.) 893, and *Saumarez* v. *Saumarez*, (1839) 4 My. & Cr. 331; 48 R. R. 116, held to be inapplicable. *Dunnage* v. *White*, (1820) 1 Jac. & W. 583; 21 R. R. 239; *Coard* v. *Holderness*, (1855) 20 Beav. 147, and *Longley* v. *Longley*, (1871) L. R. 13 Eq. 133, distinguished. KIRBY-SMITH *v.* PARNELL

Buckley J. 483

16. —— *Residue—Share of Residue—Direction that on Failure of Trusts of any Share it should "fall into Residue"—Survivorship—Accruer—Intestacy—Construction of Will.*

A testator gave his residuary estate to trustees in trust for sale and investment of the proceeds, and to hold the investments, as to one-fourth part thereof, in trust for one of his four daughters for life with remainder to her children living at her death, or the issue of any child dying in her lifetime; and as to the other three-fourths upon similar trusts for his other three daughters, their children or issue; and he declared that, if any one or more of his said daughters should die without leaving issue, their share or shares "shall fall into and become part of my residuary estate, and be held and disposed of on the same trusts as are hereinbefore declared thereof":—

Held, following *In re Palmer*, [1893] 3 Ch. 369, which overruled *Humble* v. *Shore*, (1847) 7 Hare, 247; 1 H. & M. 550, n., that upon the death of any daughter without issue her share, both original and accrued, went over to the surviving daughters respectively upon the same trusts as their original shares. *In re* ALLAN. DOW *v.* CASSAIGNE - - - C. A. 276

17. —— *Substitutional Gift—Death "before becoming entitled" to a Share—Entitled in "Possession" or in "Interest"—Construction of Will.*

In a substitutional gift in a will "in the event of either of my grandchildren dying before becoming entitled to any share of my estate":—

Held, upon the construction of the will, without reference to any authorities, that "becoming

WILL—*continued.*
entitled" meant becoming entitled in possession, not becoming entitled in interest.
Decision of Joyce J., [1902] 2 Ch. 875, affirmed. *In re* MAUNDER. MAUNDER *v.* MAUNDER C. A. 451

18. —— *Vested or Contingent—Residue to Individuals in Shares at Twenty-one—Maintenance Clause—Income for Maintenance of All—Will—Construction.*
It is now a well settled rule of construction that, where there is a gift by will of a share of residue, to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for his maintenance, the share is vested and not contingent.
A testator gave his residuary estate in trust to pay and transfer the same unto and equally between his two children, a son and daughter, on their severally attaining twenty-one, the income "during their respective minorities" to be applied in or towards their maintenance, with a power for the trustees at any time during the "respective minorities" of his said two children to advance any portion "of his or her presumptive share" in or towards "their" advancement in the world:—
Held, upon the construction of the will, that the income of each share was to be applied separately for the maintenance of the child entitled to that share, and not indiscriminately in respect of both shares, and therefore that, according to the rule above stated, each child took an immediate vested interest in his or her share.
Decision of Swinfen Eady J., [1902] 1 Ch. 945, reversed. *In re* GOSSLING. GOSSLING *v.* ELCOCK - - - - - C. A. 448

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